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PUBLIC LAW

Spring, 1957

COMMENT

THE function of Members of Parliament at this present stage in the development of British politics is uncertain and changing. No doubt the primary purpose of rather more than half of them is to support the Government; and the primary purpose of the remainder is to draw public attention to the follies of that Government's policies and to the shortcomings of its general administration. The Party " line " for both sides of the House must be determined outside the Chamber, so far as is possible. But Members are often men of vigour and independence and are not satisfied, in their hardworking and underpaid employment, merely to be gathered from time to time into the lobby folds. Revolts and dissensions seem to be more common than they were between the wars.

Despite their over-employment, Members are continuously seeking new responsibilities. For over ten years, the control of nationalised industries has worried them. They have felt excluded both by the independence of these public corporations and by the ambiguous position of Ministers. While Government Departments have avowed their respect for that independence which the Acts of Parliament conferred in matters of " day-to-day administration," this has sometimes seemed more apparent when Ministers wished to escape criticism. And there have been occasions, particularly where rates and fares were concerned, when Ministers have intervened with a certain enthusiasm. Another problem has been the extent of Ministerial influence which Parliament is powerless to control. Mr. Strauss has said (speaking of the time when he was a Minister), during the hearings of a Select Committee: " Every week on one morning I spent an hour or two with the Chairman and the Deputy Chairman of the Corporation considering every single problem, not only of national interest, but on every conceivable detail concerning that Corporation. There was not a single problem with which I was not concerned."

The Select Committee on Nationalised Industries appointed in 1955 was by its terms of reference excluded from the consideration of matters which had been decided by or clearly engaged the responsibility of Ministers, which concerned wages and conditions of employment, or which fell to be considered through formal machinery established by the statutes; and from matters of day-to-day administration. The Committee reported at the end of 1955 that these exclusions covered all the matters on which it would wish to or could usefully obtain further information. A year later the House accepted a Government motion (after the defeat of an Opposition amendment) to set up the Committee, without these restrictions, " to examine the Reports and Accounts of the Nationalised Industries." The Lord Privy Seal said that the Government had decided " simply to trust to the good sense and good will of the Committee itself. The Chairman of the Committee will have a particularly onerous and difficult task, because he will be making case law, as it were, by his conduct of the proceedings of the Committee."

When draftsmanship breaks down, *solvitur ambulando.* Clearly no one knows what ought to be the function of Members in this matter. Sir Geoffrey Heyworth, in 1953, told a Select Committee: " To investigate anything is not to find out if it is all right so much as if it is not all right how to make it better, and the very fact of investigation may make it more difficult to do that second thing. In other words, you may have hardened a few arteries. . . . Anyone can find out what is wrong at any moment of time, but very few people can get it better. . . . Autonomy and responsibility to Parliament quarrel." Sir Geoffrey was speaking more of his experience as Chairman of Unilever, Ltd., than as a part-time member of the National Coal Board; as he said in another part of his evidence: " I do not think my opinions on the coal industry are worth a damn. I mean that seriously because I learn about the coal industry at the top. I have no feeling for it. . . ." Before the same Committee, it was suggested to Lord Reith that a Select Committee could in fact not merely examine the chairman of a nationalised industry but also convey to Parliament points of view which the chairman of any corporation wanted to put. Lord Reith asked: " For whom would the public corporation be working, putting it quite straightly? " " We hope," said his questioner (though the roles were somewhat reversed), " it will go on working for the public." " I know," said Lord Reith, " but who's the boss? "

It may be presumed that Members of Parliament will not pose as authorities on coal, gas, electricity, or transport. Finance and organisation are, however, generally regarded as subjects anyone can have valuable opinions about. A critic does not have to be an expert performer himself. Nevertheless it is not easy to see what part will be played by Parliament in enhancing the efficiency of the nationalised industries. And if the question of who is the boss becomes acute much harm may be done. On this matter where each of the two major Parties takes a different view (neither of which is particularly clear), the Leader of the third Party may properly be given the (present) last word. "We are sent here," said Mr. Grimond in the House on November 29, 1956, "as politicians. It may be an interesting speculation as to why some of us are elected at all, but, speaking for myself, I know that I was not elected to run the National Coal Board. No one would vote for me on those grounds. I still believe that we are, in a sense, trying to do a job which Parliament is not intended to do. We must rely to a great extent upon the market and upon ordinary commercial practice to ensure that the nationalised industries are efficiently run."

While the Select Committee is determining the proper limits of its terms of reference, other changes are taking place. The Electricity Bill, which will separate generation from the co-ordination and control of the whole industry by the establishment of a Central Electricity Generating Board and an Electricity Council, and which will give greater autonomy to Area Boards, had its Second Reading in the House of Commons on December 17, 1956. A fortnight earlier the House passed the Transport (Railway Finances) Bill through the same stage. The background to this Bill is the assumption that the railways are passing through a long night but that there is promise of a financial dawn in four or five years and a high noon (with an annual surplus of £50m.) by 1970. So the Government propose to lend the British Transport Commission up to £250m. in the period until 1962. The new Select Committee will at least be able to watch with interest how far this salvation by faith and by works is achieved.

HER MAJESTY'S Opposition has raised the question of the Queen's functions when, during a Parliament, a Prime Minister resigns and has to be replaced by another member of the same Party. In the present case, Her Majesty seems to have consulted only Lord Salisbury and Sir Winston Churchill amongst the politicians. But, if precedent is a guide, she may have also had conveyed to her the impressions of others, through her Private Secretary. *The Times* suggested that if such situations were likely to recur often "the modern difficulties of the position and the procedure would need to be examined more closely." Some members of the Opposition seemed to feel that the Queen had inevitably become embroiled in the internal conflicts, arguments and manipulations of the Government party and that this was constitutionally undesirable. The Queen's position was certainly made more difficult by the practice normally adopted in the Conservative Party of electing its Leader (at a gathering which includes many who are not Conservative Peers or Members of the House of Commons) after the Queen's choice has been made. The Opposition

Shadow Cabinet finally contented itself with stating that, if the Labour Party found itself in a comparable position, it would follow Bonar Law's precedent: the Parliamentary Labour Party would first elect its new Leader " who would then be ready to accept the invitation of the Crown to become Prime Minister."

There is much to be said for the practice now expressly adopted by the Labour Party, which was, however, careful to say that " each political party must decide its own attitude to this question, guided by what appears to be consistent with the spirit of the Constitution and with its own internal procedures." But amongst the many subtle and strong differences which distinguish Conservative and Labour supporters there is this attitude to the appointment of leaders. It is not a simple question of more or less democracy in decision nor of more sunlight in the one case and more shadow in the other. It is a matter, once again, of temperament and of attitude to the manipulation of power. To a Labour man, Conservative methods may smack of intrigue. And to a Conservative, Labour methods may seem hypocritical. But in the result there is little to choose. The internal struggle for power may be more obviously resolved in the Labour Party. But, in the present situation, Lord Salisbury and Sir Winston Churchill could not advise the Queen to choose a Prime Minister who would command less support in the Party than some other. And if it be argued that in a marginal case their opinion might still be decisive, would it not also be true that in such a case their counterparts in the Labour Party would exert a similar influence in the Parliamentary Party? A Party may not get the Leader it deserves. But it will almost certainly get the Leader it wants.

PRAYERS for the annulment of statutory instruments are generally made either to point out some defect, in the hope that the Minister concerned will promise to consider the preparation of an amending regulation or to force a debate on some controversial issue of Government policy. The procedure was used a few years ago to keep the House of Commons sitting until the early morning, for these Prayers were exempt from the eleven o'clock rule. To remedy this a Sessional Order of the House provides that the Speaker may at 11.30 p.m. on a debate on a Prayer either put the Question forthwith or, if he thinks it has not been adequately discussed, adjourn the debate to the following day.

The Solicitors' Remuneration Order, 1956, was peculiar in that it was not made by a Government Department but by a committee set up under section 56 of the Solicitors Act, 1932, consisting of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the

President of the Law Society and the President of the Birmingham Law Society. The Order enabled a solicitor acting for a vendor whose land was acquired under the Lands Clauses Consolidation Act, 1845, or any other Act under which the vendor's solicitor's charges were paid by the purchaser, to make the ordinary scale charges instead of charges calculated under the Solicitors' Remuneration Order, 1883. The Order was made on October 19, was laid before Parliament on October 26 and was to come into operation on December 1, 1956. A Prayer against the Order was debated on November 26 which was the last praying day before the Order came into operation. The Speaker felt himself bound, after a twenty minute debate, to put the Question to the House at 11.30 p.m. because if he adjourned the debate he would put an end to the Prayer, since the Order would become operative in the meantime. The Prayer was successful, no member being willing to act as Teller for the Noes. On November 29 the Solicitors' Remuneration (Disallowance) Order, 1956, was duly made.

In reply to a question, the Speaker agreed that the effect of his ruling was that whenever any Prayer was put down on the last available praying day, he would be bound to put the Question and would be unable to adjourn it. No doubt when an instrument has been made by a Department and prayed against, the Whips will ensure the necessary attendance but the few instruments which can be made by other bodies are clearly threatened by such last minute manoeuvres.

LORD RADCLIFFE'S proposals for Cyprus are summarised below (p. 79). They have been widely applauded in this country as a brilliant piece of draftsmanship for a dyarchical system of government. They may yet prove to be valuable as a ready made scheme which can be put into operation. But the political difficulties in the way of a settlement are still so great that the proposals are not likely to prove acceptable. The Secretary of State for the Colonies has said that Her Majesty's Government would be prepared to introduce them as soon as they were satisfied that a situation existed in Cyprus in which genuine elections could be held free from violence and intimidation and that a start was at once being made with the drafting of the necessary constitutional instruments so that elections might be held as soon as conditions allowed. But the Secretary of State seemed to indicate that the Government's attitude of self-determination had hardened over the last months. He said: " When the international and strategic situation permits, and provided that self-government is working satisfactorily, Her Majesty's Government will be ready to review the question of the application of self-determination." By speaking so cautiously of the possibility of self-determination, the Secretary of State may have made more difficult the introduction of self-government. When, later in his speech, he suggested partition as a possible solution, he made the hopes for self-government no brighter. Perhaps the Government feels that events have overtaken Lord Radcliffe. Self-government under a constitution such as he has devised was, we thought, meant to be a stage before the final solution. Has the Government's view of the nature of that solution now greatly changed? It is not easy to see how Lord Radcliffe's proposals, which seek to protect minorities within one unitary State, can be a stage towards anything if partition is likely to be the Government's solution.

MR. J. E. S. SIMON has felt obliged to resign from the Editorial Board of *Public Law* on his appointment as Under Secretary of State in the Home Office. He has helped us greatly in the past year with advice and suggestions. We are very sorry to lose him.

PARLIAMENTARY CONTROL OF DELEGATED LEGISLATION IN AUSTRALIA

THE following note supplements the account of developments in this field given by Sir Cecil Carr in *Public Law*, Autumn 1956, see especially pp. 212–213. South Australia set up a Joint Committee of the two Houses in 1937, by amendment of its Constitution Act—(No. 2381 of 1937). The legislation does not set out the principles on which the Committee is to act, but the Committee has by resolution adopted rules similar to those of the Commonwealth Senate Committee mentioned by Sir Cecil. This Committee has been a very active one, partly because the property-franchise Upper House has a tradition of political independence and provides a forum in which the Committee can move for disallowance against a hostile Cabinet. The Commonwealth Senate Committee has never taken the initiative in moving for disallowance, either jointly or through its Chairman; the Chairman of the South Australian Committee has sometimes done so. (South Australia, like the Commonwealth, has standing provision for disallowance of tabled regulations in its Acts Interpretation Act (s. 38).) Victoria has now followed suit with the Subordinate Legislation Committee Act, 1956 (No. 5991 of 1956), which also takes its place in the State Constitution Act. The Act establishes a Joint Committee of the two Houses—three members from each, the same as the South Australian. The Act itself sets out the principles which the Committee is to observe in its scrutiny; they are similar to the Commonwealth and South Australian rules, but somewhat more elaborate, the points covered being in summary: whether regulations are *intra vires* or in accord with the " general objects " of the delegating Act; clarity of form and meaning; undue trespass on pre-existing rights; undue use of administrative discretion; matter proper for Act rather than regulation. Victoria has no standing provision for parliamentary disallowance of regulations, and *pace* Attorney-General Rylah in his first reading speech (which gives an excellent summary of English and Australian discussions and provisions—Vic.Parl.Deb., 1956, p. 3804) very few Victorian Acts delegating regulatory power individually have such provision; one of the first steps by the new Committee should be to recommend such general provision, without which it will lack an effective sanction. Speakers in this debate made some point of the fact that the South Australian Committee had not moved for a disallowance since 1950, but that Committee had moved so actively in previous years that Departments and Ministers have learned to be careful in their drafting habits and to treat Committee reports with respect. This writer reported on the Australian situation to the Edinburgh Colloquium on Comparative Law in July 1956, and found his Westminster parliamentary friends somewhat perturbed at the idea of these Committees considering questions of "*vires*." But since exclusion of judicial control over delegated legislation is frequently attempted in Australia, this parliamentary power should at least be held in reserve; it has not often been exercised.

G. S.

THE DOCTOR'S DILEMMA—A CURIOUS DECISION

UNDER regulations which have been in force since 1948 (now the National Health Service (Services Committees and Tribunals) Regulations, 1956, reg. 16) a local executive council is empowered to recover from a doctor the cost of any preparation prescribed by him which the council considers does not form part of the pharmaceutical services provided under the National Health Service Act. The doctor has a right to ask for the matter to be decided by the local medical committee, a statutory body consisting mainly of the elected representatives of general practitioners in the council's area, and both the doctor and the Minister of Health may appeal to a referee or referees against the committee's decision. The purpose of these regulations is to prevent the prescribing of certain preparations for nutritional, toilet, cosmetic, and other purposes, which ought not to be charged to the National Health Service. As might be expected there are several cases in which a preparation will be regarded as a medicine necessary for the treatment of the patient in one case, but as a food or cosmetic, etc., in another case. The regulations recognise this by providing that the decision must be made in the light of the circumstances of the individual case. Nevertheless many of these decisions have given rise to comment in the medical press, from which it appears that the medical profession is often perplexed as to the reasoning whereby the decisions are reached. The case mentioned below suggests that this perplexity may extend beyond the medical profession.

A patient known to have suffered from malaria, and therefore susceptible to the consequences of re-infection, consulted his National Health doctor as to the proper safeguards he should take before making a short visit of about a week to a country in a malarial zone. In addition to the usual inoculations and vaccination the doctor gave him a prescription for dimethyl phthalate, an insect repellent, with the object of protecting him from malaria-bearing mosquitoes known to be prevalent in the country about to be visited. The local executive council notified the doctor that it proposed to recover the cost of the preparation from the doctor's remuneration, and the doctor requested that the case should be decided by the local medical committee, who decided in his favour. The Minister appealed.

In these circumstances the Minister is required to appoint a referee or referees (not exceeding three) none of whom must be officials of the Ministry, and one of whom must be a general practitioner. The usual practice, as in this case, is for a Barrister-at-Law, a Professor of Pharmacology and a general practitioner to be appointed. The referees considered the arguments of the Minister's representative and a written statement from the doctor concerned. They decided the prescription was not, in the circumstances, a preparation which the Executive Council were bound to provide. The local medical committee's decision was therefore reversed and a sum of money withheld from the doctor's remuneration accordingly. The substance of the referees' decision is given in the following passage from their report: " We think the prevention of disease is a medicinal purpose, but for the preventative to be a proper medicine under this Act there must be a proximate connection between its operation and the threatened disease. Here the object is to repel a mosquito which might approach the patient, and if it approached him might bite him, and if it bit him might infect him with malaria. We think the connection is too remote." [1]

Now whatever the desirability of the preparation being a charge on the Health Service in the circumstances of this case, it is very difficult to justify the referees' decision on the reasoning given above. The references to remoteness and proximate connection are particularly unfortunate, and seem to suggest that a doctor failing to prescribe an insect repellent in identical circumstances might not be negligent. It is interesting to note that the referee's decision in this case was noted, without comment, in the *Journal of the American Medical Association*,[2] where it has, no doubt, provided excellent propaganda for the opponents of a prospective state medical service.

J. D. J. HAVARD.

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[1] *Executive Council* (1956) 77–78.

[2] 161 *J.Amer.Med.Assn.* (1956) 1584.

CONSTITUTIONAL ASPECTS OF THE CANADIAN PIPE LINE DEBATE

EUGENE FORSEY

THE Canadian pipe line debate of May and June, 1956, turned on a measure to set up a Crown corporation empowered to do two things: (1) build a natural gas pipe line from the Manitoba–Ontario border east to Kapuskasing, Ontario, at a cost of about $118,000,000, and (2) lend to Trans-Canada Pipe Lines Limited 90 per cent. of the cost of building another line from the Alberta–Saskatchewan border to Winnipeg, the maximum loan to be not more than $80,000,000.

There were at least four reasons why this bill ought to have been thoroughly debated.

First, it was one of the most important ever to come before the Parliament of Canada. It was important to every citizen because it involved large sums of public money. It was important to Alberta, because the trans-Canada line of which the western (Alberta–Winnipeg) and the northern Ontario (Manitoba–Kapuskasing) sections were to be parts, offered that province large and growing markets for its immense gas reserves: 300,000,000 cubic feet per day in Canada, and 200,000,000 in the United States (through a spur line running south from Winnipeg). It was important to southern Ontario and Quebec, where about two-thirds of Canada's industries are concentrated, because they have no coal, almost no oil or natural gas, and Ontario is on the verge of exhausting its last reserves of cheap, easily accessible hydro-electric power. Clearly, Alberta and central Canada alike needed every assurance that the line would be built as cheaply as possible, and that the missing links between Winnipeg and the Manitoba–Ontario border, and from Kapuskasing to southern Ontario and Quebec, would really be built, built promptly, and built in time, so that the gas would not be stopped half or two-thirds of the way to its destination. Clearly, also, central Canada needed assurance that American industries would not get the gas cheaper than Canadian, more especially as Trans-Canada Pipe Lines is overwhelmingly controlled by American companies, one of which, through another subsidiary, would be the principal American buyer.

Secondly, the bill was highly controversial. The CCF (the

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Canadian equivalent of the British Labour Party) thought the whole trans-Canada line ought to be publicly built and owned. The Conservatives were by no means satisfied that some other private company could not have done the job with less, or no, government aid. Both Opposition Parties objected to giving Trans-Canada a loan to build the western section. Both objected to the preponderance of American control.

Thirdly, neither the bill nor anything like it had ever been before the electors for decision. The Government had no mandate for it.

Fourthly, even the first part of the bill, providing for the northern Ontario section, had been before the public only since the autumn, and the second part, providing for the loan to Trans-Canada for the western section, had never been before the public at all until a few days before the debate began. The resolution providing for this part of the bill appeared on the order paper only on May 9; the Minister of Trade and Commerce moved for Committee of the Whole on the resolution on May 14.[1]

The bill ought to have been thoroughly debated. But it was not. It was rammed through by the repeated use of closure in circumstances absolutely unprecedented, and by repeated violations of both the letter and the spirit of the rules, not only by the Government but also by the Speaker and the Chairman and the Deputy Chairman of Committees.

THE CANADIAN CLOSURE RULE

It must be noted at the outset that the Canadian closure rule is altogether different from the British. The Canadian closure can be moved only by a Minister; it cannot be refused by the Speaker or the Chairman of Committees; it is carried by a simple majority. Once the Minister has given notice at a previous sitting, he can move that " the debate shall not be further adjourned, or that the further consideration of any resolution or resolutions, clause or clauses, section or sections, preamble or preambles, title or titles, shall be the first business of the Committee and shall not be further postponed; and in either case such question shall be decided without debate or amendment; and if the same shall be resolved in the affirmative, no member shall thereafter speak more than once, or longer than twenty minutes in any such adjourned debate; or, if in Committee, on any such resolution, clause, section, preamble or title; and if such adjourned debate or postponed consideration shall not have been resumed or concluded before one of the clock in the morning, no member shall rise to speak after that hour, but all such questions as must be decided in order to conclude such adjourned debate or postponed consideration, shall be decided

[1] *Commons Debates* (Canada), 1956 (unrevised), pp. 3715 and 3846.

forthwith."[2] In other words, if the Minister gives notice on Monday and closure is carried on Tuesday, the vote must be taken at one o'clock Wednesday morning.

This rule was introduced in 1913, after the House had debated the Naval Aid Bill for thirty-six days or parts of days, including two weeks when it sat without interruption, except for Sundays and the two-hour dinner recess each day.[3] It was intended to prevent repetition of that sort of thing, and has been very rarely used.

It was used in 1913 on the Naval Aid Bill in Committee, to carry clauses 2 to 6, after the bill had been debated for forty days or parts of days.[4] It was used in 1917 on the Canadian Northern Railway Acquisition Bill, to carry clauses 1 to 4 and the title, after the bill had been under debate for nine days or parts of days, and again to carry third reading, after a further two days' debate.[5] It was used again in 1917, on the Wartime Elections Bill, to carry second reading after two days' debate; to carry all the clauses, a schedule and the title, after a further three days' debate; and again to carry third reading after a further day's debate.[6] It was used in the first session of 1919, on the Canadian National Railways Bill, to carry eight of the thirty-two clauses and two schedules and the preamble and title, after five days' debate.[7] It was used in 1921 to carry interim Supply, and one item in the Estimates, after two days' debate.[8] It was used again in 1926, to carry the motion, " That the question be now put "[9] on the Address in Reply to the Speech from the Throne, after the Address itself had been debated for eighteen days and the " previous question " for a further ten.[10] It was used again in 1932, on the Unemployment and Farm Relief Continuance Bill, to carry the motion to go into Committee on the antecedent resolution, after eleven days' debate, and to carry all the clauses and the title, after three days' further debate.[11] In short, down to May 14, 1956, closure had been used only eleven times in forty-three years.

On the pipe line bill, closure was applied four times in twenty-two days. The antecedent resolution was carried by closure on May 16, after two days' debate; second reading of the bill itself on May 23, after four days' debate; all the clauses and the title on June 2, after seven days' debate; and third reading and passage on June 6, after two days' debate.[12]

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[2] Rule 33, *Standing Orders of the House of Commons* (Canada), 1955.

[3] *Commons Debates* (Canada), 1912–1913, *passim.* The figures include debate on the antecedent resolution.

[4] *Ibid.*, p. 9445 and *passim.*

[5] *Ibid.*, 1917, pp. 5016, 5082, 5123, 5195 and *passim.*

[6] *Ibid.*, pp. 5566, 5636, 5707, 5770, 5806, 5880.

[7] *Ibid.*, 1919 (first session), pp. 1797, 1864.

[8] *Ibid.*, 1921, pp. 2076, 2094–2095.

[9] In Canada, this motion does not mean what it says. If carried, it merely prevents further amendments.

[10] *Commons Journals* (Canada), 1926, p. 123 and *passim*; *Commons Debates* (Canada), pp. 1484–1486.

[11] *Commons Debates* (Canada), 1932, pp. 1427–1428, 1609, 1615.

It is not merely, however, that closure was imposed four times, but that it was imposed in utterly unprecedented circumstances. On the resolution preceding the bill itself, the Minister of Trade and Commerce, Mr. Howe, concluded his opening speech by giving notice of closure, before anyone else had uttered so much as one syllable, whether of support or criticism.[13] That was unprecedented. When the bill itself reached Committee of the Whole, Mr. Howe rose, on clause 1, uttered fifty-two words of explanation, and moved " that further consideration of this clause be postponed." [14] This motion is, of course, not debatable. On clause 2, he uttered fifty-five words, and then moved the same motion.[15] On clause 3, he uttered one hundred words, and then moved the same motion.[16] Clause 4, virtually meaningless without the first three, which had not yet been even voted on, let alone discussed, was carried, under closure, after four days' debate, much of it on points of procedure.[17] Clauses 5, 6 and 7 were carried, under closure, without one word being uttered on them by anyone, and clauses 1, 2 and 3 were then also carried under closure without one word of " further consideration." [18] Six of the seven clauses, therefore, were carried without one word of " consideration " except Mr. Howe's 207 words of explanation on the first three. This also was unprecedented.

It was also, even apart from other proceedings, some already noted, some still to be noted, a gross and flagrant breach of the spirit of our Constitution. Parliamentary government is not just a matter of counting heads instead of breaking them. It is also a matter of using them. It is government by discussion, not just by majority vote. Parliament is not just a voting place. It is also, pre-eminently, essentially, a talking place, a *parlement*. " Parliaments without parliamentary liberty," said Pym, " are but a fair and plausible way into bondage. Freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved." [19]

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[12] *Ibid.*, 1956 (unrevised), pp. 3895, 3972, 4165–4166, 4239, 4498, 4556, 4640–4641, 4689–4690, 4764 and 4774–4775. In Canada, third reading and passage are distinct stages. There was also one day's debate on the motion to go into Committee on the bill. Much of the debate on all stages was on questions of procedure, which, in Canada, can be, and often are, debated at length.

[13] *Ibid.*, pp. 3864–3865. All the Opposition said before notice was given was " Oh! oh! " and " Who wrote that? " at p. 3860, and " Some goose! " at p. 3864.

[14] *Ibid.*, p. 4283.

[15] *Ibid.*, p. 4293.

[16] *Ibid.*, pp. 4308–4309, 4311.

[17] *Ibid.*, pp. 4498, 4640.

[18] *Ibid.*, pp. 4498, 4640–4641.

[19] Quoted in Arthur Beauchesne, *Rules and Forms of the House of Commons of Canada*, 3rd ed., p. 91.

The immoderate use of closure was, indeed, a double violation of the Constitution. The Government's four closure motions broke no rule of the House. They did something far worse: they violated the spirit which gives life to all our laws and all our rules, the unwritten conventions of moderation, self-restraint, decency, fair play, without which our whole system crumbles into ruins.

What prevents the Parliament of Canada from getting an amendment to the Constitution abolishing French as an official language? No law. What prevents any provincial Legislature from prolonging its own life indefinitely? No law. What prevents a Government defeated in the House from refusing either to resign or go to the country? No law. Just those unwritten conventions of the Constitution. It is, as Mr. St. Laurent himself said a few years ago, " not our manner " to do such things.[20] That is, ultimately, the sole guarantee of our freedom.

THE BILL IN COMMITTEE

For the improper use of closure the Government was solely responsible. For the treatment of the bill in Committee, which was even worse, the Government and the Chairman of Committees must share the responsibility. When the Government took the position that Mr. Howe's fifty-two words of explanation on clause 1 constituted " consideration," and the Chairman so ruled,[21] they violated the plain sense of the rule and the meaning of the English language. When the Government did the same thing to the next two clauses, and then applied closure to all three, and three others as well, they made an almost complete mockery of the whole Committee stage. It is hardly necessary to add that that stage is one of the most important. Redlich, indeed, calls it " the centre of the whole legislative action of the House of Commons." " It is in Committee," he says, " that the fate of a bill is really decided; its ultimate form is there settled in the clash of parties and opinions or by the compromises made between them." [22] This applies with especial force to the discussion of clause 1, on which, as Mr. Fulton told the Manitoba Conservative Association on June 22, 1956, " by custom, . . . wide ranging question and answer are permitted." " That," as Mr. Fleming said, " is where we have the general discussion. That is where we get information. . . . If you take away our rights on this first clause you deny to us and you deny to the Canadian people the opportunity to get that information without which . . . no self-respecting Canadian House of Commons can proceed."[23] It is in Committee that members can ask questions and keep on asking questions till they force the Government to admit either that it does not possess the information or will not divulge it. In this particular case, the Committee of the Whole was doubly important because the Government had refused to send the bill to the Select Standing Committee on Railways, Canals and Telegraph Lines, where witnesses could have been called.[24] The whole performance amounted to an almost complete emasculation of the Committee of the Whole, and therefore of Parliament itself.

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[20] Quoted by Mr. Knowles, *Commons Debates* (Canada), 1956 (unrevised), p. 4509. Mr. Meighen, the father of the Canadian closure rule, was asked in 1913 whether a Government might not use the rule as the present Government did use it in 1956. He said yes, but it would be " absurdity itself " and " could not be perpetrated except by a Government which was at once insane and vicious " (quoted by Mr. Fulton, *Commons Debates* (Canada), 1956 (unrevised), p. 4514).

[21] *Ibid.*, p. 4292. The ruling was appealed to the House and upheld by a vote of 148 to 61: pp. 4292–4293. On appeals from the rulings of the Speaker or Chairman, see below.

[22] Quoted by Mr. Drew, *ibid.*, p. 4288.

THE SPEAKER

For still other violations of the rules, and for some very strange conceptions of the rules and of the functions of the Speaker, the Speaker and the Deputy Chairman must accept responsibility. A few examples will suffice.

On May 14, when Mr. Knowles was pointing out that in 1927 the Government had used a certain procedure which required the unanimous consent of the House, the Speaker interrupted him: "Would the hon. member be good enough to say what the Minister could have done if the answer to his request for unanimous consent had been 'no'?" Mr. Knowles replied by asking "whether that is a good question?"[25] This is a classic of understatement. It was a fantastically irrelevant and improper question. What the Minister could have done if the rules of the House prevented him from taking the step he wanted to take is the Minister's problem, not the Speaker's. It is, or should be, wholly outside the range of that officer's consideration.

That was bad enough. Worse was to follow. On May 23, Mr. Fulton had moved a motion to give certain instructions to the Committee of the Whole. The Speaker ruled that such a motion could properly be moved at this particular point, but that Mr. Fulton's motion was out of order for other reasons. Mr. Knowles then moved a second motion of the same kind. The Speaker admitted his right to do so. But he asked, rather plaintively, "How long am I going to act as if the Minister of Trade and Commerce should not have his motion put forward from the chair and therefore should not be recognised at all, so as to give how many hon. members the chance to move many intervening motions in the meantime?" [26]

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[23] *Ibid.*, Mr. Fleming, p. 4290.

[24] Mr. Diefenbaker's motion to that effect, an amendment to second reading, was defeated, 163–64; *ibid.*, p. 4239.

[25] *Ibid.*, p. 3849.

Mr. Knowles replied: "Literally any number of such motions may be made provided they meet the conditions you yourself have laid down." The Speaker seems to have been genuinely surprised by this: "Am I," he asked, "going to delay the motion of the Minister of Trade and Commerce if there are four, five, six or seven motions for instructions?" [27]

On both occasions, the Speaker's words seem to imply that if the rules get seriously in the way of doing something the Government wants done, no reasonable person can expect the Government to follow them or the Speaker to enforce them, at any rate after a certain point.

On May 31, the Prime Minister moved closure, covering "clauses 1, 2, 3, 4, 5, 6, 7, the title of the said bill and any amendments thereto." [28] In the early morning of June 2, the Deputy Chairman ruled that this covered also reporting the bill.[29]

On June 5, the Prime Minister moved closure to cover "third reading . . . and . . . any amendments thereto." [30] Under Canadian procedure, the passage of the bill is a distinct stage,[31] as, indeed, the Speaker on this very occasion tacitly admitted by putting the motion that "This bill do now pass and the title be as on the order paper," and allowing a division on it.[32] But he ruled that the closure motion covered not only third reading but also passage.[33]

On May 31, Mr. Fulton appealed to the House from a ruling of the Deputy Chairman. Under the rules, the Speaker must in such case take the chair and immediately put the appeal to the House.[34] On this occasion, however, when the Speaker was about to put the question, Mr. Churchill raised a point of order,[35] which the Speaker mistakenly allowed him to argue at some length, and then ruled against him. Mr. Churchill then appealed from the Speaker's ruling,[36] as, under Canadian practice, he had a right to do.[37] The appeal failed,[38] and Mr. Dufresne moved adjournment, which was defeated.[39] Mr. Colin Cameron then raised a question of privilege upon two letters to a local newspaper reflecting on the Speaker's conduct. The Speaker told him he must make a motion, carefully instructed him what to put in it, and, having read it, asked: "Is the House ready for the question?"[40] The Leader of the Opposition began to speak to the motion, but was interrupted by the Leader of the House, who tried to remind the Speaker that all he could do was to put the appeal from the Chairman's ruling. The Speaker would not even allow him to finish. He also stated flatly that nine words in one of the letters were "privilege," and that in the other letter "there may be more paragraphs there which are incriminatory, but . . . this is a matter on which perhaps I might have to give a ruling on a future occasion." He also said that he himself "would have to be heard" at some stage in the debate on the motion.[41] The Leader of the Opposition then proceeded, and at ten o'clock, the usual hour for adjournment, moved adjournment of the debate.[42]

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[26] *Ibid.*, p. 4260.
[27] *Ibid.*, p. 4261.
[28] *Ibid.*, p. 4498.
[29] *Ibid.*, p. 4641.
[30] *Ibid.*, p. 4689.
[31] Beauchesne, *op. cit.*, citation 435, p. 166.
[32] *Commons Debates* (Canada), 1956 (unrevised), pp. 4774–4775.
[33] *Ibid.*, p. 4773.
[34] Beauchesne, *op. cit.*, citation 428, p. 162.
[35] *Commons Debates* (Canada), 1956 (unrevised), pp. 4518–4521.
[36] *Ibid.*, p. 4526.
[37] Rule 12, *Standing Orders*, 1955.
[38] *Commons Debates* (Canada), 1956 (unrevised), pp. 4526–4527.
[39] *Ibid.*, pp. 4527–4528.

Next morning, on the order for resuming the adjourned debate, he rose again, but got no farther than the words, "Mr. Speaker." The Speaker rose to announce that he had decided the two letters were not breaches of privilege, and that he therefore ruled Mr. Cameron's motion out of order.[43]

To say that the Speaker's right to do this was doubtful is to go to the limit of charity. But what followed is almost beyond belief. The Speaker said, correctly, that on the previous afternoon, he had made a very serious mistake. He had been called back to the chair to put to the House an appeal from a ruling of the Chairman in Committee of the Whole. He ought not to have allowed any other proceedings. So far, so good. But he went on to say that he "felt the House should not suffer any prejudice or detriment" because of his mistake. He therefore proposed that the House should "revert to the position where it was yesterday when I was brought back to the chair." After considerable uproar, he duly called upon the House to vote on his "proposition"—in other words, he moved a motion from the chair—and vote it did, the Conservatives and CCF abstaining because they considered there was no question properly before the House.[44]

After this, it may seem an anti-climax to add a further illustration of the Deputy Chairman's odd interpretation of the rules, but it is too important to omit. On May 31, the Prime Minister had, as we have seen, moved closure on all the clauses. That motion was, by its terms ("at this sitting"), limited to the sitting of May 31, ending, under the closure rule, at one o'clock in the morning of June 1. But, as we have also seen, the House adjourned at ten o'clock on May 31, without the motion having been voted on. After the Speaker had, by his " proposition," accepted by the House, declared Friday Thursday, Mr. Fleming raised the point that, nonetheless, the closure motion had, by the operation of its express terms, died a-borning, and could not be revived. Fresh notice of closure would be necessary. The Deputy Chairman ruled against him.[45]

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[40] *Ibid.*, pp. 4528–4531.
[41] *Ibid.*, pp. 4531–4532.
[42] *Ibid.*, pp. 4533–4534.
[43] *Ibid.*, p. 4537.
[44] *Ibid.*, pp. 4539–4540, 4542–4543, 4551–4554.

For its use of closure, and the treatment of the bill in Committee, the Government offered four reasons.

First, urgency. If the western section was not started in 1956, it probably could not be started before 1958; and if it were to be started in 1956, the bill must be passed by both Houses by June 7.[46]

But, even assuming that these statements are correct, would such delay have been really serious, serious enough to warrant such extraordinary treatment of Parliament? And need the Government have waited as long as it did to introduce its measure? Its original proposal, for the Ontario section only, was brought down on March 15, but never proceeded with.[47] Some time between then and May 1, when there were press reports that the Government was going to lend Trans-Canada " some $70 million or more," [48] the Government must have become aware that its original proposal would have to be supplemented. Yet it was only on May 9 that notice of the new one appeared on the order paper.[49]

Secondly, the Opposition had threatened obstruction.[50] So it had. It had a perfect right to threaten it, and a perfect right to engage in it.

There is a widespread impression in Canada that obstruction is something new and vicious. It is neither. It is certainly not new. The Liberals used it in 1881 on the C.P.R. charter, and again in 1896 on the Remedial Bill, and again in 1913 on the Naval Bill. The Conservatives used it in 1911 on the Reciprocity Agreement, and again in 1955 on the Defence Production Bill. These are only a few of the more conspicuous cases, and in most of them, it may be added, the obstruction lasted for weeks or even months.[51]

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[45] *Ibid.*, pp. 4567–4570, 4576–4581.

[46] *Ibid.*, pp. 3663, 3860, 4423; and Blair Fraser, in *Maclean's*, July 7, 1956, p. 56.

[47] *Commons Debates* (Canada), 1956 (unrevised), pp. 2164–2200.

[48] *Ibid.*, p. 3436. On April 11, Mr. Fleming asked about results of discussions that day between the Government and Trans-Canada: *ibid.*, p. 2820.

[49] *Ibid.*, pp. 3715, 3718.

[50] *Ibid.*, pp. 4151, 4338, 4422, 4685.

[51] *Commons Journals* (Canada), 1880–1881, *passim*, show twenty-four days' debate, beginning December 13, 1880, and ending February 1, 1881; *ibid.*, 1896 (first session), show twenty-seven days' debate, beginning March 3 and ending April 16; *ibid.*, 1910–1911, show thirty-five days' debate, beginning on January 26, 1911, and ending on July 28; *ibid.*, 1955, show fourteen days' debate, beginning March 10 and ending on July 11. On 1912–1913, see above. In 1896, 1911 and 1955 the obstruction succeeded. The first two measures were dropped, in 1896 because Parliament was within a few days of dissolution by efflux of time, in 1911 because the Government abruptly dissolved it. In 1955, the Government inserted the amendments the Opposition had demanded.

Nor is it vicious. On a great issue of public policy, a Government defeated in Parliament is entitled to appeal from Parliament to the people, because it believes the existing Parliament has lost the confidence of the people. Equally, on a great issue of public policy, an Opposition, facing certain defeat in Parliament, is entitled first to try to rouse public opinion and so force the Government to back down; and secondly, if that fails, to try to force an appeal from Parliament to the people, and for precisely the same reason which entitles a defeated Government to appeal: that it believes the existing Parliament has lost the confidence of the people.

A Government makes its appeal by dissolution. An Opposition makes its appeal by trying to force dissolution, by obstruction. Obstruction is not, of course, " by any to be taken in hand unadvisedly, lightly or wantonly, but reverently, discreetly, advisedly, soberly," and from a deep conviction that it is indispensable in the public interest. Used, as it should be, and almost always has been in Canada, only for the gravest reasons, it is a legitimate and indeed essential part of the parliamentary system; in the last resort, with the Government's power of dissolution, the only way of keeping Parliament responsible to the people.

So neither the threat of obstruction, nor the procedural objections and dilatory motions of the Opposition on May 9, 10 and 14, before Mr. Howe began his initial speech in Committee on the resolution, justified what the Government did.

Thirdly, the Government cited what it called the precedent of 1932, when Mr. Bennett's Government moved closure in Committee of the Whole on the Unemployment and Farm Relief Continuance Bill, and clauses 2 and 3 were carried without one syllable of discussion.[52]

But this was really no precedent at all. For one thing, closure was not imposed at the very outset of the proceedings on the antecedent resolution, as it was in this case, but only after prolonged debate: notice of closure was given only after nine days' debate.[53] What is more, the bill was a totally different kind of bill. All it proposed to do was to extend the life of the Relief Act of 1931 for two months; clause 1 was the only clause of substantial importance (the other two merely provided for the tabling of orders and regulations, and for citing and construing the two Acts together) and the measure had been debated, on various stages, for thirteen days or parts of days before the Government gave notice of closure in Committee on the bill; and clause 1 had been debated, with the discussion ranging all over clauses 2 and 3 as well, for a whole day.[54] On the pipe line bill,

[52] *Commons Debates* (Canada), 1956 (unrevised), pp. 4504–4505.

[53] *Ibid.*, 1932, p. 1394.

[54] *Ibid.*, pp. 1540–1550, 1555–1605.

clause 1 was never discussed at all, nor were the real substantive clauses 3, 5, 6 and 7. Alleged precedents have to be examined by the light of reason and common sense. Cases have to be " distinguished." If the differences between the cases of 1932 and 1956 are not enough to distinguish them decisively, then reason and common sense have ceased to have any meaning.

Fourthly, Government supporters repeatedly and triumphantly cited the numerous cases of the use of closure in the British House.[55] The answer to this is simply to read the two rules.

For the actions of the Speaker, the Chairman of Committees and the Deputy Speaker, most of the more plausible defences were offered not by those officials themselves (though all three argued the points of order at great length) or even by the Government, but by kind friends outside the House.

The Prime Minister did, indeed, cite Redlich in support of the Speaker's moving a motion from the chair: " It is clear enough from an express order, made so long ago as 1604, that when precedents are not conclusive the Speaker is to lay the matter before the House for decision." [56] The order itself says: " If any doubt arise upon a bill, the Speaker is to explain but not to sway the House with argument or dispute." [57] May, on the same point, says: " Doubtful cases may arise on which the rules of the House are indistinct or obsolete, or do not apply strictly to the point at issue; when the Speaker, being left without specific directions, refers the matter to the judgment of the House "; [58] and he gives two examples. Both were in 1806. In the first, the Speaker said: " It was in the discretion of the House to permit or restrain such extraordinary proceedings. He did not feel warranted in interfering." In the second, he said he " wished to be instructed by the House, whether it could be permitted to a member to read written speeches in that House." [59]

There is, plainly, not the slightest warrant in any of this for what Mr. Speaker Beaudoin did; indeed the order of 1604 expressly prohibits precisely what he tried to do before he " submitted " his " proposition." [60]

The Prime Minister also cited a Canadian precedent, a proposal by Mr. Bennett in 1929. This, however, turns out on examination, to have been merely a suggestion that the Speaker submit to the House whether a certain amendment was in order.[61] It is as irrelevant as the quotation from Redlich.

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[55] *Ibid.*, 1956 (unrevised), pp. 3901, 3947, 4030, 4218, 4657, 4743, 4748–4749.

[56] *Ibid.*, p. 4656. The reference is to Redlich's Vol. II, p. 145.

[57] Redlich, *loc. cit.*, footnote: *House of Commons Journals*, Vol. I, p. 187.

[58] May, *Parliamentary Practice*, 15th ed., 1950, pp. 450–451. See also Jennings, *Parliament*, p. 60: " Accordingly, if the precedents are not clear, the Speaker leaves the matter to the House."

[59] May, *loc. cit.*, footnotes. The second reference is to 1807, but should be to 1806.

[60] Mr. Speaker himself later quoted Beauchesne's citation 322: " Every matter is determined in the House of Commons upon a question put by the Speaker on a proposition submitted by a member and resolved either in the affirmative or negative ": *Commons Debates* (Canada), 1956 (unrevised), p. 5554.

The main defence of the Speaker, the Chairman and the Deputy Chairman is more general. It amounts to something like this: that the Canadian Speaker, unlike the British, has never been really impartial; he never could be, because he is not " permanent " but ordinarily changes with each new Parliament, and because he is so often " promoted " from the Speakership to the Cabinet. So poor Mr. Beaudoin and Mr. Robinson and Mr. Applewhaite were really not so very much worse than their predecessors if worse at all; the fault was not in them, but in the low standards of Canadian politics generally and the lamentable tradition of the Canadian Speakership in particular.[62]

Has this argument, even apart from the astonishing implication that the sins of earlier presiding officers provide sufficient absolution for those of the present incumbents, any validity? Have earlier Speakers and Chairmen really been always so bad? Have they often been " promoted " to the Cabinet?

Appeals from Rulings

If all Canadian Speakers and Chairmen had been as bad as most of the recent ones, one would expect to find that all of them had had their rulings appealed as often as the recent ones. But this is not so. From the beginning, the Canadian rules have provided for an appeal to the House from any decision of the Speaker. From 1885, when the Deputy Speakership was established, they have also provided for an appeal to the House from any decision of the Chairman in Committee. A search of the Journals shows that from 1867 to 1905 inclusive, there was not one single appeal from a Speaker's ruling. There was one in 1906–1907, one in 1909–1910, two in 1912–1913, two in 1917, one in 1922, two in 1925, five in 1926, and one each in 1928, 1929 and 1930. In other words: no appeals in the first thirty-nine years of the Dominion, and only seventeen in the first sixty-three years. But from 1931 to 1953 inclusive, a period of twenty-two years, there were seventy-five. Mr. Speaker Black had sixteen in four sessions, Mr. Speaker Bowman four in one session, Mr. Speaker Casgrain five in six sessions, Mr. Speaker Glen ten in six sessions, Mr. Speaker Fauteux twenty-eight in five sessions, and Mr. Speaker Macdonald twelve in seven sessions. Mr. Speaker Beaudoin had two appeals from his assumption of office in 1953 to the beginning of the proceedings on the pipe line; in the next four weeks he had ten.

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[61] *Commons Debates* (Canada), 1929, p. 2787.

[62] For a qualified version of this, see Professor J. R. Mallory's article, " Parliament and Pipeline," in 34 *Canadian Bar Review*, No. 6, pp. 714–730.

The number of appeals from a Speaker's rulings is not, of course, by itself, conclusive evidence of his competence or impartiality or the reverse. But the glaring contrast between the very few appeals down to 1930 and the enormous number since certainly suggests that something has happened to the Canadian Speakership in the last quarter century, and that conclusions drawn from that period are, to say the least, not necessarily valid for the whole of Canadian history since Confederation.

Appeals from Chairmen's rulings from 1885 to 1929 inclusive numbered fifteen. There were none from 1886 to 1898 inclusive, or from 1900 to 1909–1910 inclusive. From 1931 to 1951 (second session) inclusive, there were twenty-six. From then till the beginning of the pipe line debate there were none. In the pipe line debate there were fourteen. The contrast between the first forty-four years, with fifteen, and the last twenty-five (down to the beginning of the pipe line debate) with twenty-six, is not quite so glaring as with the Speakers, but it is plain. It is also plain that the present Speaker and Chairman are in the later tradition rather than the earlier.

One answer to this is that the number of appeals is, by itself, evidence of nothing at all "except a change in recognised parliamentary tactics." [63] But why have the tactics changed, if indeed they have? Professor Mallory, who propounds this theory, says that Professor Ward, in his account of the Canadian House down to 1891, "suggests that the absence of any challenges at all" in that period "is accounted for by the certainty that the ruling would in any event be sustained—'the right to challenge a Speaker's ruling was fully recognised, and often referred to, but the simple fact that the Speaker was from the first a partisan appointee meant that the support of the majority for any ruling he might make could virtually be taken for granted.'" [64] But the Speaker is still just as much a partisan appointee as ever he was; and in only one of the hundred and four appeals has his ruling been upset.[65] Chairmen's rulings also have invariably been sustained, with a solitary exception.[66] The evidence certainly suggests "that the support of the majority for any ruling" either Speaker or Chairman may make can still "virtually be taken for granted." Yet the number of appeals has risen drastically.

Professor Mallory himself says: "That there were only two appeals against Mr. Beaudoin's rulings between his election to the chair and the pipe-line debate is evidence of his skilful and impartial conduct of his office."[67] Two appeals in two years is evidence of impartiality. No appeals in thirty-nine years, or six in fifty-four, is not: a rather odd exercise in logic.

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[63] Mallory, 34 *Canadian Bar Review*, No. 7, p. 883.

[64] *Ibid.* His reference is to the *Canadian Journal of Economics and Political Science*, vol. 18, p. 437.

[65] June 25, 1926; *Commons Journals* (Canada), 1926, pp. 477–478.

[66] In 1948; *Commons Journals* (Canada), 1948, pp. 275–276.

The very article from which Professor Mallory quotes contains two other passages which positively confirm the negative evidence of reasonable impartiality of earlier Speakers provided by the total absence of appeals. When Mr. Speaker Kirkpatrick wanted to be put in the Cabinet, Sir John A. Macdonald gave as one reason for refusing " a general impression " among the Conservative members " that . . . you were afraid of Blake [the Liberal leader] and generally decided against your Conservative [friends] "[68]: a complaint which has certainly not been made against any recent Speaker. Of the Speakers as a whole down to 1891, Professor Ward says that they " checked members on both sides of the House impartially, and both Liberal and Conservative leaders were called to order by their own appointees."[69]

Professor Mallory also cites Professor Ward as " assert[ing] that most of the early Speakers continued to be active partisans and ' at least three of the first six Speakers aspired to a Cabinet post after their term in the Chair.' "[70] Actually, about all that Professor Ward seems to say about " active partisanship " is that the early Speakers continued to look after patronage in their constituencies; and he notes that Mr. Speaker Kirkpatrick once, against his will, stayed away from a public demonstration in honour of his leader.[71] As for the three who " aspired " to the Cabinet, the point is not what they aspired to but what they got: down to 1891 not one was made a Minister.

What about the supposedly frequent " promotions " from the Chair to the Cabinet?

Actually, Macdonald's other reason for not putting Kirkpatrick into the Cabinet was that " Since Confederation no Speaker of the Commons " had been so " transferred "[72]; and while Macdonald lived, none was. Even after he died, the practice was for many years comparatively rare. Mr. Ouimet went from the Speakership to the Cabinet in 1892, Mr. Brodeur in 1904, and Mr. Sévigny in 1917. From then until 1940, there were no cases. But from 1940 to 1953, three of the four Speakers who preceded Mr. Beaudoin went direct to the Cabinet.[73] Once again, there is all the difference in the world between recent years (in this case, the last fifteen or so) and the earlier period: only three of the first eighteen Speakers went from the Chair to the Cabinet, but three of the last four before Mr. Beaudoin. For most Canadian Speakers down to 1940, the Speakership was the climax of their public careers.

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[67] Mallory, in 34 *Canadian Bar Review*, No. 6, p. 722.

[68] Ward, *loc. cit.*, p. 436.

[69] *Loc. cit.*, p. 437.

[70] Mallory, in 34 *Canadian Bar Review*, No. 7, p. 884; Ward, *loc. cit.*, p. 436.

[71] Ward, *loc. cit.*, p. 437.

[72] *Ibid.*, p. 436.

[73] *Canada Year Books* and *Canadian Parliamentary Guides*, *passim*. Mr. Speaker Rhodes (1917–1921) left the House in 1921, became Premier of Nova Scotia in 1925, and entered the Dominion Cabinet in 1930.

Professor Mallory's reply to this is that " One would hardly have expected the Speaker to have been promoted to the Cabinet after the general elections of 1878, 1896, 1911, 1921, 1930 and 1935, since in each case there was a change of Government "; so that " in six further cases it was not going to happen anyway." [74] But people are often taken into a Canadian Cabinet not *after* but just *before* an election. One was in 1872, two in 1882, one in 1887, five in 1896, nine in 1917, eleven in 1921, five in 1925, three in 1930, seven in 1935, seven (including Mr. Speaker Glen) in 1945, and two (including Mr. Speaker Macdonald) in 1953.[75]

CONCLUSIONS

It has been necessary to examine with some care the defences generally proffered for Mr. Beaudoin's conduct, not only because they are historically unsound but because they all lead up to a conclusion highly convenient for him and for the Government (since it absolves them both of the responsibility they ought to bear) but highly dangerous for the Canadian people. That conclusion is that the only way of rescuing our Speakership from its low estate is to copy the British Speakership: to make ours " permanent," and to abolish appeals from the Speaker's decisions (and with them, presumably, the debates on points of order). This is highly dangerous, not because it is undesirable but because it is impossible. It might not have been impossible if we had started out that way at Confederation and kept it up. Actually, we did start out that way: our first Speaker served through two Parliaments.[76] But we did not keep it up; and now, for good or ill, the tradition of alternating French-Canadian and English-Canadian Speakers is firmly established.[77] It is possible that if Mr. Beaudoin had fulfilled his early promise, he might have become our first " permanent " Speaker; and when he retired, full of years and honours, the French-Canadians might have accepted a " permanent " English-Canadian Speaker until he chose to retire; and so on, back and forth. But that chance is now gone. Mr. Beaudoin has forfeited it. He has forfeited it by his conduct in the Chair during the pipe line debate. He has forfeited it by being the subject of a motion of censure moved by the Leader of the Opposition towards the end of that debate.[78] He has forfeited it by writing a letter in which he strongly impugned the motives of those who had attacked his conduct, a private letter, indeed, but published by the journalist to whom it was addressed.[79] He has forfeited it by submitting his resignation, with the express statement that he wanted it " accepted as soon as possible," and then, a week later, withdrawing it at the instance of the Prime Minister, who blandly assured the House that his own " confidence " in Mr. Beaudoin was " unshaken " and that he believed that confidence was " shared by an overwhelming majority of members." [80] In the next Parliament, English-Canadians will certainly insist that it is their turn in the Chair; in the following Parliament the French-Canadians will equally insist that it is theirs.

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[74] Mallory, in 34 *Canadian Bar Review*, No. 7, p. 884.

[75] *Canada Year Books* and *Canadian Parliamentary Guides, passim.*

[76] Mr. Speaker Cockburn, 1867–1874.

[77] It began only in 1879, and was broken when Mr. Speaker Lemieux served through three Parliaments, from 1922 to 1930; but this was the exception which proves the rule. A " permanent " Speakership has been advocated at various times, notably after the election of 1872 (Ward, *loc. cit.*, p. 437) and by Sir Robert Borden in 1917; but, except in the former case, nothing came of it.

In these circumstances, to advocate a " permanent " Speakership is waste of breath, and worse, because it fixes the public's hopes on an unattainable reform in the machinery of electing our Speaker, and distracts them from the only attainable reform, a return to the sound tradition of the pre-1930 Canadian Speakership.

Even if a " permanent " Speakership were attainable, the remedy might prove worse than the disease. Canadians, like other North Americans, have a boundless faith in machinery. What we sometimes forget is that no machinery will work unless those who operate it understand it and want to make it work. A " permanent " Speakership in Canada, unless the Government's whole attitude to the office changed, might mean only being permanently saddled, while he lived, with some wretched incompetent or party hack. The present Government and its followers, to judge by the Prime Minister's speech announcing that Mr. Beaudoin would not resign, and by the applause with which it was received, feel that the confidence of the Government and the majority is all a Speaker requires. The notion that he needs also to have the confidence of the minority seems never to have crossed their minds. New machinery for electing a " permanent " Speaker whose decisions should be subject to no appeal, operated by people with that conception of the Speakership, would be a very dubious blessing, to say the least.

What the pipe line debate revealed, above all, was that the Government and the presiding officers alike had simply no understanding of the basic principles of parliamentary government.

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[78] *Commons Debates* (Canada), 1956 (unrevised), p. 4643. The debate is recorded at pp. 4643–4660, 4783–4786, 4794–4831, 4845–4869. The motion was defeated, 109–35.

[79] *Ibid.*, pp. 5509–5515.

[80] *Ibid.*, pp. 5553–5555 and 5763.

They had no understanding that it rests on discussion. Their use of closure and their treatment of the bill in Committee showed that. So did the Prime Minister's defence that " we realise the responsibility we are taking in doing our best to bring this matter to a division where all members . . . will . . . be able to exercise their right to express *by their votes* their opinions upon the measure," and that " we have acted within the rules to protect the rights of all hon. members on both sides of the House to express their opinion *by their vote* on this measure in time to be effective." [81]

They had no understanding that parliamentary government rests on the rule of law; that the Government must not break the rules any more than any private member; that majorities are not enough; that they must be majorities acting within the rules. The presiding officers repeatedly and flagrantly broke the rules; the Government and its supporters, to the last man, almost invariably sustained them in so doing [82]; the Prime Minister himself, a month after it was all over, went out of his way to proclaim his " unshaken confidence " in the Speaker. Not least revealing were certain questions of the Speaker himself when he was " submitting " his " proposition " to make Friday Thursday: " What more can hon. members ask than that the matter be left to them to decide? . . . What could be more democratic? " [83] He apparently simply could not see what Mr. Knowles meant when he said: " That is rule by majority, not rule by the rule book." [84]

They had no understanding that parliamentary government rests on unwritten conventions of self-restraint and fair play; that if any one part of it uses all its legal power it can wreck the whole thing. All their conduct showed that.

They had no understanding of the sacredness of an Opposition, of the fact that the decisive difference between parliamentary democracy and " people's democracy " is the existence of a freely functioning Opposition, an Opposition with the means of becoming the Government, peacefully, decently and in order.

They had no understanding of the sacredness of the office of Speaker. They saw him transformed from the servant and shield of the House into the creature and tool of the Executive, without a syllable of protest, without so much as a sign even of uneasiness. They showed no consciousness of the fact that it is the Speaker's peculiar duty to protect the rights of the Opposition. He must, of course, protect also the rights of the Government, notably the right to get a decision after proper debate. But the Government's rights are very seldom in danger, because it ordinarily has a majority. It can look out for itself. The Opposition cannot, because it ordinarily has not a majority. That is why it is the Speaker's duty to guard with the utmost care and vigilance even the most technical rights of the minority. Unless he does, the very fabric of free parliamentary institutions is in danger.

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[81] *Commons Debates* (Canada), 1956 (unrevised), pp. 4505 and 4659; italics mine.

[82] There was one exception. The Chairman of Committees had refused to hear a member on a point of order because it was after one o'clock, and had directed him to take his seat. The member refused, and the Chairman reported him to the Speaker. The Leader of the House persuaded the Chairman to go back into Committee and hear the point of order: *ibid.*, pp. 3967–3969.

[83] *Ibid.*, pp. 4551–4552.

[84] *Ibid.*, p. 4551.

Last, but not least, the Government and the presiding officers showed no understanding that obstruction is a necessary part of the parliamentary system. They were not even clear about the necessity of a device for ending obstruction when it has performed its function: they thought it was a device for preventing obstruction.

The worst thing about the constitutional aspects of the pipe line debate is not what was done, bad though that was, nor even that those who did it showed, and still show, not the slightest sign of repentance. What is really terrifying is that they show not the slightest sign of feeling that there is any need for repentance. On the contrary, they all seem to have felt throughout, and to feel still, a conscience void of offence, even a virtuous horror of the Opposition's resistance to "constituted authority" in the person of the Speaker. (For them, the policeman who tries to search a house without a warrant is "constituted authority," and the citizen who resists him a malefactor.) Two things stood out all through the pipe line debate itself, and even more in the debate on Mr. Drew's motion of censure on the Speaker. One was the Opposition's deep sense of outrage at the violation of every principle of parliamentary government: "moderate men," as Mr. Churchill said,[85] "were aroused to . . . an intensity of feeling" where, as one of the most moderate of them, General Pearkes, said: "It is almost impossible for me to associate on any level of friendship with some of those who have taken a leading part in this debate." [86] The other thing that stood out, no less starkly, was the Government's total inability to understand, or even believe in, this sense of outrage. They seem to have been genuinely unable to see any reason for it at all; genuinely surprised, puzzled, even hurt, by it.

From this state of mind in a Government with an enormous majority it is possible to draw only one conclusion: that parliamentary government in Canada is very sick. The sickness did not begin with the pipe line debate. It began thirty years ago, when another Government tried to prevent another House of Commons from pronouncing judgment on its conduct, was stopped by the Crown's refusal of dissolution, but won the subsequent election, largely on a cry of " Downing Street interference " which (unknown to the electors) it had itself asked, and which the Governor-General had refused. The sickness has been getting steadily worse almost ever since.[87] It became acute last spring. It will not be cured until the Canadian people and their rulers have re-learned what parliamentary government means.

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[85] *Ibid.*, p. 4803.

[86] *Ibid.*, p. 4807.

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[87] See my *Royal Power of Dissolution of Parliament*, 1943; and my article, " Mr. King and Parliamentary Government," in *Canadian Journal of Economics and Political Science*, vol. 17, pp. 451–467.

CROWN PRIVILEGE

P. Ingress Bell, T.D., Q.C., M.P.

In the course of litigation there comes from time to time a matter which is incidental to the issues being tried. It is the public interest. Whether the issue be between subjects of the Crown or between the Crown or one of its Ministers and a subject, there may come a time when the disclosure of certain facts whether upon discovery or by way of answer to interrogatories or at the hearing itself would be contrary to the public interest. This claim when made upon discovery is customarily called a claim of Crown Privilege. It is not, however, a happy or apt expression as Viscount Simon observed in *Duncan* v. *Cammell Laird & Co.*[1] " Privilege," said the learned Viscount, " in relation to discovery is for the protection of the litigant and could be waived by him, but the rule that the interest of the State must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation and, indeed, is a rule on which the judge should if necessary insist, even though no objection is taken at all."

Discovery by a litigant was and is the disclosure by him of all documents relating to the matter in question which are or have been in the possession or power of the litigant or his agent. The documents are not confined to those upon which the one litigant intends to rely. However, disclosure of the existence of the document does not mean that the opposite party can insist on its production for inspection. It is accordingly at this stage, namely inspection, that the plea of privilege ordinarily becomes effective. The private litigant can claim protection on a number of grounds. He can allege that the documents tend to incriminate him; that they expose him to forfeiture: that they are communications passing between client and legal adviser in his professional capacity. These claims may be properly described as claims of privilege. A litigant can indeed raise other objections but they can hardly be described as objections based on privilege. He can claim that the documents are not in his sole possession: that he only holds them as agent or trustee for persons not parties to the action. Finally, he can swear that the documents relate only to his case and do not relate to nor tend to prove or support his opponent's case nor impeach his own.

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[1] [1942] A.C. 624 at 641.

DEVELOPMENT OF LAW

This body of law has grown up slowly and by stages. Discovery is one of the children of Equity and it is said that the practice of obtaining disclosure on oath of relevant documents by a Bill in Chancery originated in the reign of Henry VI. But in Select Cases in Chancery there is indeed reported an application for discovery of the names of two prisoners taken at Agincourt whose ransom money it was alleged had been stolen by the defendant. In time the common law courts themselves, particularly in exercise of their equitable jurisdiction came to give limited discovery of documents of a public character and where the documents were held by a party in fact or interest. Many of the early cases where public policy became relevant were slander actions. In such cases the plaintiff was complaining of reports made about him to superior officers or authorities which he alleged to be malicious. He accordingly sought discovery of the official records or correspondence.

Such a case was *Home* v. *Lord Bentinck*.[2] Lt.-Colonel Home brought an action for libel against Lord Bentinck who had been appointed by the Duke of York, Commander-in-Chief, with six other officers to inquire into the conduct of the Colonel in certain private business matters outside his duties as an officer and to report thereon to the said Duke. The plaintiff alleged that the defendant " wrongfully intending to injure the plaintiff, and to deprive him of the countenance and good opinion of the Duke of York falsely and injuriously suggested and represented to the Duke of York that the said persons so appointed as aforesaid had unanimously agreed in certain opinions." The most damaging opinion set out was that the plaintiff did not appear " to have been actuated by those high and delicate feelings of honour which in all transactions of life ought to influence an office of his high rank and reputation."

The plaintiff called as a witness the military secretary to produce the minutes of this court of inquiry. Objection was taken by counsel for the defendant which Abbott C.J. sustained and further refused to allow a copy of the said minutes to be received in evidence. The matter later came before the court on a bill of exceptions whereon the judgment in favour of the defendant was affirmed. Dallas C.J., in the course of his judgment referred to what he described as ordinary cases wherein persons cannot on grounds of public policy be asked to disclose the sources of their information such as where frauds on the revenue are alleged and cases of high treason. " No person," said the Chief Justice, " would become an informer if his name might be disclosed in a court of justice and if he might be subjected to the resentment of the party against whom he had informed."

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[2] 2 Brod. & B. 129.

This reasoning, he declared, applied closely to the case under consideration.

In *Dawkins* v. *Lord Rokeby*,[3] an action for a libel contained in a written memorandum submitted by the defendant, a witness to a court of inquiry, it was held that all evidence tendered before such a court was privileged in like manner as evidence in a court of law and since the evidence was part and parcel of the minutes, the minutes themselves were inadmissible in evidence.

Beatson v. *Skene*[4] is perhaps the most frequently cited case on public policy. It was another action, for slander, the slander being a statement alleged to have been made by the defendant who was secretary and Civil Commissioner to the Commander of the Turkish contingent, which included an irregular cavalry unit known as Beatson's Horse, to a General Shirley who had been appointed by the Commander to investigate the condition of the unit whose command the plaintiff had recently resigned. Prior to the action a court of inquiry was held to investigate certain charges brought by the plaintiff against General Shirley and it was the minutes of this court which the plaintiff desired to bring in evidence in this action, against the defendant. The case was a curious one in that the defendant admitted he had made the statements alleged as recorded in a letter passing between the Commander and General Shirley. No privilege seems to have been claimed for this letter. The court, moreover, excluded certain other letters for which privilege was claimed on the grounds that they were written long before the slander. The minutes of the court of inquiry were, it seems, not made by a person who was present and on these grounds alone were inadmissible. The court, however, dealt with the public policy point since it had been the reason given by the court below for exclusion of the evidence. Pollock C.B. said[5]: "We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice: and the question then arises, how is this to be determined?

DETERMINATION WHETHER DISCLOSURE AGAINST PUBLIC INTEREST

"It is manifest it must be determined either by the presiding judge or by the responsible servant of the Crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against." It might here be observed in passing that, as was argued by Mr. Wallington, as he then was, in the *Cammell Laird* case, it is better for the litigant that there should be discussions behind his back *ex parte* than that the bare word of the Crown officials should automatically prevail.

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[3] (1873) L.R. 8 Q.B. 255.

[4] (1860) 5 H. & N. 838.

[5] *Ibid.*, at 853.

The same issue was raised as late as 1888 in another libel suit, *Hennessy* v. *Wright*,[6] but this time it was the superior authority which brought the action. The Governor of Mauritius complained that he had been libelled by the publisher of *The Times* by a statement in the newspaper that he, the Governor, had sent to the Secretary of State for the colonies garbled accounts of certain proceedings in the colonial assembly. Field J.[7] considered two aspects, *i.e.*, danger to the nation and injury to servants of the Crown as individuals. "There would be an end of all freedom in their official communications," said the learned judge, "if they knew that any suitor, that, as in this case any one of their own body whom circumstances had made a suitor, could legally insist that any official communication of no matter how secret a character should be produced openly in a court of justice."

In the course of his judgment he referred to *Smith* v. *East India Company*[8] (not a case of libel but a commercial dispute) a decision which although depending on this point to some extent on an Act of Parliament was also based on public policy. In that case Lord Lyndhurst said that if correspondence between the East India Company and the Board of Control should be subject to production the effect would be "to restrain the freedom of communications and to render them more cautious, guarded and reserved."

We have therefore in the earlier cases, apart from instances of definite public security, which were never arguable, a range of cases based on protection of sources of information and freedom of official communications. No one seriously disputes the desirability of keeping secret the names of informers, though in criminal cases the claim is sometimes waived and can, surely, always be waived by the informer. It is the claim for absolute protection for official communications, *per se*, which is under increasing criticism because in this class of case the bare word of the Crown officials prevails. It has not always been accepted that the court cannot or should not investigate the claim of privilege. One of the judges in *Beatson* v. *Skene* considered that if the judge was satisfied the document might be made public without prejudice to the public service he should compel its production and the Chief Baron conceded that a case might arise where the matter was so clear that the judge might ask for production. Field J. in *Hennessy* v. *Wright* declared that he considered that he was entitled to carry out such a private investigation. In fact the court has in a number of cases looked at the documents. In *Robinson* v. *State of South Australia*[9] the Judicial Committee of the Privy Council reversed the decision of the Supreme Court of Australia and remitted the case back with the direction that it was proper for the exercise of the courts' power to inspect documents. That case was distinguished by Mackinnon L.J. in the *Cammell Laird* case in the Court of Appeal[10] as a "very special case," *i.e.*, the State was the defendant, the claim arose out of commercial and trading activities of the State and the claim was not made in proper form. However, the House of Lords in dissenting from *Robinson* v. *State of South Australia* relied on no such distinctions. It held that the Minister's objection was final and not open to question if properly raised. Viscount Simon quoted the passage from *Smith* v. *East India Co.*, cited by Field J. above, and indeed adopted the main division of claims of this nature into those in which public security demanded protection for specific documents and those protected in order that the principle of unrestrained freedom of communication between public servants might be preserved. Thus he says[11]: "It will be observed that the objection is sometimes based upon the view that the public interest requires a particular class of communications with or within a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced, if they were ever liable to be disclosed in subsequent litigation rather than on the contents of the particular document itself." At a later stage the learned Viscount after indicating the sort of grounds which would not afford the Minister adequate justification for objecting to production said that he ought not to take the responsibility of withholding production except, for example, "where disclosure would be injurious to national defence or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

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[6] 21 Q.B.D. 509.

[7] *Ibid.*, at 512.

[8] (1841) 1 Ph. 50.

In 1947 the Crown Proceedings Act was passed and though by section 28 the Crown could for the first time be compelled to grant discovery and answer interrogatories, which in law and irrespective of privilege it could never previously be compelled to give, the rule as to withholding documents as well as evidence in the public interest remained. Notwithstanding the clear exposition of the law in the House of Lords the private litigant still pressed the Executive. Thus in *McKie* v. *Western Scottish Motor Traction Co.*[12] he tried unsuccessfully to see a police report. In *Glasgow Corporation* v. *Central Land Board*[13] he tried unsuccessfully to see the official instructions given to valuers concerned with assessing development charge. In *Broome* v. *Broome*[14] owing to a too ambitious certificate of the Secretary of State for War, who certified not only that certain documents made by S.S.A.F.A. concerning parties' matrimonial difficulties but also the evidence of the S.S.A.F.A. representative given orally was not in the public interest, the private litigant had some success. He could not see the documents but the Crown was unable wholly to set aside the subpoena since the certificate did not indicate the nature of the evidence for which privilege was claimed.

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[9] [1931] A.C. 704.
[10] [1941] 1 K.B. at 644.
[11] [1942] A.C. at 635.

It seems, however, likely that the case of *Ellis* v. *Home Office*[15] caused the most disturbance to the Executive. In that case a prisoner claimed damages for a murderous assault committed on him by a fellow prisoner. The assailant was a suspected mental defective and the plaintiff alleged that the prison authorities were negligent in allowing the assailant to have access to the plaintiff knowing what they did or ought to have known about the mental condition of the assailant. It is obvious therefore that access to the medical records was of vital importance. Only in this way could the evidence of the prison doctor be checked. However, privilege was claimed for all these records and when on such evidence as was available Devlin J. found for the defendants he expressed his " uneasy feeling that justice may not have been done because the material before me was not complete and something more than an uneasy feeling that, whether justice has been done or not, it certainly will not appear to have been done." The learned judge made a more general observation which cannot be or should not be ignored. " The rule means when a Government Department is defendant that every litigant against a Government Department—and such litigation is becoming more and more frequent as the sphere of government activities is extended—is denied as a matter of course the elementary right of checking the evidence of government witnesses against the contemporary documents."

In the Court of Appeal Singleton L.J. said he could not see any reason why the reports should not have been produced. There was, he considered, the danger of a wide claim of privilege being made without consideration of individual documents. Jenkins L.J. agreed that the decision of the responsible Minister in respect of any particular document should be final. It may perhaps be significant that the proviso to section 28 of the Crown Proceedings Act, 1947, refers to the disclosure of *the document* as being injurious to the public interest. It does not in terms refer to a class of documents a few of which may be of some value to the applicant but which, valuable or not, are in practice all usually withheld on the grounds that freedom of communication must be maintained in principle and no exceptions made. But there would appear to be a material distinction between security documents and class documents. In the case of the former no evidence by copies or *viva voce* is admissible; and indeed the court must prevent it being given. In the case of class documents not being security documents it would seem that the evidence could be given by copies or *viva voce*. Sachs J. in *Broome* v. *Broome* [16] expressed the view that a fact stated in a privilege document could be put in evidence *aliunde* and could not be excluded merely because it had been stated in a privileged document. Clearly he cannot have been referring to details of an aeroplane or submarine, secret matters themselves apart from official documentary records.

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[12] 1952 S.C. 206.

[13] 1955 S.L.T. 155.

[14] [1955] P. 190.

[15] [1953] 2 Q.B. 135.

MODERN DEVELOPMENTS

There are a number of factors which never had to be considered, until this century, in relation to discovery. Devlin J. drew attention to one, *i.e.*, the increasing impact of Government upon trade and property. There is another potent factor, namely, the growth of what is sometimes called administrative law. Many statutes now expressly provide that the Minister's opinion shall be final. If in his opinion there are reasonable grounds no objective test can be applied. There may be no reasonable grounds at all, or he may have been grossly misinformed as to relevant facts by one of his officers, yet his actions cannot be challenged. Courageous attempts are made from time to time to attack this infallibility by proving *mala fides* on the part of some subordinate. It is an almost hopeless task since the documents recording the advice and the conduct of the officials inevitably come within the class of documents protected. Thus there is denied to the private citizen even that small chance of challenging the acts of the executive. It would be idle to deny that there is not grave disquiet amongst the general public about the fairness of decisions of the executive. They do not express their dissatisfaction in these express terms. They blame " the hordes of civil servants." In this respect it is hoped that the public will be appeased to some extent by the recommendations of the Franks Committee. Perhaps some machinery giving the private citizen some information as to why and on what grounds his liberty was restricted, *e.g.*, his property taken, will be devised. He may be allowed to see a little of what goes on behind the scenes. Indeed, to restrict the power of the executive to protect class documents is but part of the claim for fairer treatment which is made by the citizen. It would be incorrect to state that there are many cases of injustice as a result of the application of this rule of law. But it would not be at all an exaggeration to say that the invocation of this rule has undermined public confidence in the civil service and indeed in the administration of justice. The judiciary is itself restive as the observations of Devlin J. and Singleton L.J., quoted above, show. Morris and Jenkins L.JJ. also showed their disquiet. Sachs J. in *Broome* v. *Broome* wished to see the claim for protection circumscribed by reference to certain specific heads of public interest such as safety of the realm, international relations or the prevention and detection of crime. He pointed out that if disclosure of documents could be resisted on the grounds of maintaining the morale of the forces it would not be unduly logical to claim protection for the purposes of maintaining general public morale and thence to maintaining faith in specific institutions. The refusal to produce the medical sheets in *Ellis's* case was not based on any apprehended danger to the realm nor upon fear of victimisation. It was just a confidential report and upon that the claim was made. Further if, as seems to be the growing custom, privilege is claimed for all interdepartmental communications and reports presumably as an all-embracing class of documents, because and only because the disclosure in one case would disturb the civil service and cause them in the future not to be as open and frank as they should be, there is really no limit to this plea. It is indeed not without interest that a local authority endeavoured to rely on letters from officers of the Ministry of Health claiming privilege as sufficient to justify non-disclosure. It was, moreover, in that case, *Blackpool Corporation* v. *Locker*,[17] that Scott L.J. called attention to "the really monstrous character of some of the contentions and actions of both the corporation and the Ministry." This matches the damning indictment of Sir Andrew Clarke Q.C. in his report on the *Crichel Down* inquiry. His conclusion from examining documents which would never have been seen if Lt.-Commander Marten had been a plaintiff in an action, for example claiming that the Ministry had not acted *bona fide*, was that a most regrettable attitude of hostility to Lt.-Commander Marten was evinced by the three principal public servants concerned.

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[16] [1955] P. at 196.

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[17] [1948] 1 K.B. 349.

LORD CHANCELLOR'S STATEMENT

In his statement in the House of Lords the Lord Chancellor stated that the reason for the protection for class documents was " to secure freedom and candour of communication with and within the public service so that Government decisions can be taken on the best advice and the fullest information." The fruit of this freedom and candour of communication was in fact that two serious misstatements of fact were made, to the Minister by his officials in the *Crichel Down* case. It is in any case at least as desirable that the communications should be accurate as that they should be candid. The law, it will be remembered, already gives personal protection to a civil servant for his official statements. There can be no doubt that in the absence of malice no action for libel or slander lies against him. Nor is it easy to apprehend how advice honestly given to a Minister could itself ever constitute evidence of any kind. The Lord Chancellor then observed that the class of documents should be clearly settled but he gave no indication as to the principle upon which the classes should be determined. Is it indeed only a senior civil servant who will communicate freely and candidly without the assurance that his communications will never be made in public in a law court? Possibly it would be the juniors who couldn't care less. Are the classes to be defined by the status of the parties or the subject-matter? On June 6, 1956, the Lord Chancellor, in a statement in the House of Lords, proposed to narrow the class—which had not been defined except as presumably " all communications with or within the public service." Thus: —

(1) Reports of employees and other eye witnesses of accidents on Government premises and subsequent reports made by officials as to machinery, premises or vehicles, will henceforth be produced but not the reports of a factory or mines inspector investigating an accident. The inspector, it is suggested, should be allowed to give evidence of fact but his report should be privileged.

(2) Ordinary medical reports in respect of the health of civilian employees should not be privileged, but medical reports and records in the fighting services should not be produced in proceedings between private litigants. In the case where the Crown or a doctor employed by the Crown is sued for negligence or the evidence is necessary for an accused in a criminal trial these reports and records will be disclosed.

(3) In civil cases statements made by witnesses to the police will be produced.

(4) Factual reports in Government contract cases will be disclosed.

It is not at all clear that privilege has hitherto been claimed for all these cases on the "confidence of communication" basis. It is certainly clear that employees and other eye witnesses on Government premises were always compellable witnesses, and there never was any justification for excluding their reports which were absolutely necessary if their evidence at the trial was to be checked. The Government could hardly ask for a higher degree of candour in an inspector's report than was required in the witness-box. Some reports of factory and mines inspectors are published and presumably no privilege can be claimed for these. So far as unpublished reports are concerned, if the inspector gives evidence but cannot have it checked by his report, the judge will be in an unenviable position. The comments in *Ellis's* case will still apply. Nor is it easy to see how an expert who has examined the scene of the accident can be expected to state facts but not to draw any conclusions. The Lord Chancellor explained that in the case of a report the Department is not an employer but is exercising Government functions and different considerations arise. He did not explain the considerations. Certainly public security might be involved but if it was not, the inspector could surely be trusted to stand by his report in the witness-box.

There seems some weight in the argument in favour of protecting medical reports in the forces. In order to encourage the men to trust and take medical advice it is perhaps as well to keep their records out of private litigation. But it is not easy to understand the argument that this secrecy is also necessary to secure frank reports by the M.O. to his Commanding Officer. Nor indeed does there seem any real justification for assuming similar lack of moral courage in prison doctors. In principle the doctor whether his patients are civilians, soldiers or prisoners should be wholly unaffected by this so-called encouragement. From the soldiers' point of view they would probably prefer the doctor to be certain and sure rather than "frank" which seems to be some sort of "gloss" on an ordinary medical opinion.

Statements made by witnesses to the police have it seems already for some time been produced on subpoena in civil actions as a matter of courtesy, not duty. That they should ever have been refused simply shows how preposterously the claim for privilege has been extended.

So far as factual reports on Government contract cases are concerned there may well be some difficulty in settling whether any particular document or what part of it is a factual report. A report which was not factual is unlikely to be of any evidential value. But since a state of a man's mind is as much a state of fact as the state of his digestion perhaps the word "factual" will not be emphasised in practice.

Having, it seems, excluded the above four items from the class of documents the Lord Chancellor returned in his statement to deal with "departmental and inter-departmental minutes, and memoranda containing advice and comment and recording decisions."

In particular the Lord Chancellor referred to these in relation to *ultra vires* actions. He said: "If it becomes possible to challenge Government action by reference to the opinions expressed by individual civil servants in the necessary process of discussion and advice prior to decision, the efficiency of Government administration would be gravely prejudiced."

It would have been helpful if the Lord Chancellor had on this the vital point given some specific example. The opinions of civil servants given to a Minister prior to decision may be good or bad so far as policy is concerned. The advice may be to confirm or not to confirm a certain compulsory purchase order or to refuse to allow certain development. The courts cannot, though Parliament might, challenge the Minister's action. The Ministry might well object to its policy machinery being discussed in court. But upon the issue as to whether an act was or would be *ultra vires* or not the opinion of the Minister's advisers would not be evidence as to the legality of the act in question. Indeed, under the ordinary rules of discovery it would seem that such advice could be excluded from being adduced in evidence. The same observations apply to comments by civil servants upon issues in a case and the question of liability. The Lord Chancellor said these would not be of high evidential value. He observed that they might be used effectively in cross-examination and somewhat strangely added: "It can hardly be said that their non-disclosure prejudices the administration of justice. An effective cross-examination which is irrelevant to the administration of justice should not be allowed at all!"

What indeed such comments upon the exercise of powers or upon liability might reveal would be that misstatements of fact had been made in them or that malice inspired the advice. It is really for these reasons that discovery becomes important since lack of *bona fides* is almost the sole ground upon which executive action can be challenged. To take an example, the Act might authorise a Minister to requisition land for schools. He might be advised generally on the merits of the proposal. He would be advised to act under some particular power. Later the project of building a school might be abandoned and the land allocated for housing. The owner of the land might claim that the Minister had no power to take the land because either he knew before he confirmed the compulsory purchase order that the school project had been abandoned or having been abandoned before the purchase was complete, it was his duty to cancel his confirmation. The documents advising the purchase would be immaterial, but the letter advising the Minister that the project had been abandoned by the local authority and the date of that letter would be very material.

It would not be the efficiency of the administration which would be imperilled if such facts came to light. It would be its inefficiency which would rightly be called to account. The Lord Chancellor claimed that protection for inter-departmental minutes was also desirable in such actions as wrongful imprisonment, malicious prosecution or defamation since such actions might easily give rise to comment in the press and questions in Parliament. High level advice might be required in such cases and it could not be easily given, he said, entirely frankly, if it were subject to discovery in the subsequent proceedings. It is true, of course, that any case involving the liberty of the subject is likely to give rise to comment in the press or Parliament. But clearly if the high level advice came from the law officers it would, under ordinary law, be privileged. In so far as the Government Department sought statements of evidence as to facts those communications would be privileged. See Blackburn J. in *Fenner* v. *S. E. Ry.*[18] One would have thought this was sufficient protection. It is disquieting to reflect that, for example, the matter of defending an action for false imprisonment brought against the police should depend not on top-level legal advice but on top-level political advice. //

Finally, the Lord Chancellor observed that in many fields the Minister's responsibility to Parliament and the governmental nature of his functions inevitably result in very different methods from those of a commercial company. No one could conceivably overlook this, but briefly the real difference is that the Government is charged with care of the public interest. Moreover, local authorities and nationalised industries as much as Government need " frank advice and freedom and candour of communication " but have no Crown privilege. It would be surprising if all commercial firms did not also expect frank advice from their employees. The question therefore remains whether Crown privilege for, as yet, unidentified classes of inter-departmental documents is necessary to secure this loyal service.

RECOMMENDATIONS OF BAR COUNCIL

The Bar Council's recommendations envisage documents of two different categories, *i.e.*, national security documents and documents the production of which would otherwise be contrary to public interest. In the case of non-national security documents it places the burden on the Minister to satisfy the court that production in private or in open court would be (a) contrary to public interest and (b) that the prejudice to public interest by production would outweigh the prejudice to the parties by non-production. To adjudicate on this the court could examine the document without its being disclosed to the parties.

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[18] (1872) L.R. 7 Q.B. 767 at 770–772.

The proposals are not altogether satisfactory. They concern production and make no reference to discovery which, of course, is not the same thing being only disclosure of the existence of the document. There is no attempt to define national security or distinguish it from public interest. Thus to disclose the name of an informer may be described as a matter of national security as well as being against public interest. The difference would be important. So far as examination by the court is concerned clearly where a Government Department is a party to the litigation the document cannot be examined without disclosure to one of the parties. One will already have the document. Nor is it easy to visualise the principle on which the prejudices can be weighed against each other.

Whilst *Ellis* v. *Home Office* in a sense re-alerted the judiciary and the Bar, the *Crichel Down* case, with the disclosure of documents which would have been protected by Crown privilege in litigation, raised the interest of the House of Commons and the public. A number of Government supporters accordingly took the opportunity of tabling amendments to the Restrictive Trade Practices Bill on the lines of the Bar Council's recommendations so far as the new Restrictive Practices Courts were concerned. The Labour Party in its pamphlet " Personal Freedom " declared: " Some improvement in procedure is clearly desirable. One possible remedy would be for the Lord Chancellor to decide whether Crown privilege should apply to official documents which a Minister wished to withhold from the court."

Finally, in consideration of the withdrawing of the amendments to the Restrictive Trade Practices Bill, the Government allotted to the House, October 26, 1956, for a debate on Crown privilege. The Attorney-General in that debate instanced as classes of documents which should properly be protected Army medical reports, and trade reports made to the Board of Trade. Such documents, he declared, came within the general principle of confidentiality. The debate revealed a number of criticisms. Sir Lionel Heald, for example, said: " The suggestions that a civil servant will not give an honest opinion if he thinks that someone is going to read a document afterwards is something which the ordinary man or woman in the street will not accept." Mr. Knox Cunningham made a number of effective citations from the laws in the States of America. The State of Colorado he pointed out provides that: " A public officer shall not be examined as to communications made to him in official capacity when the public interest, in the judgment of the court, would suffer by disclosure."

The Minister of Pensions and National Service in winding up the debate claimed that since 1913 a very high degree, though not a complete degree, of protection to the confidentiality of the social or national insurance records had been given. He said that the guarantee that a claim would only be made in proper cases and on proper grounds was that a Minister was answerable to Parliament. It is, however, not easy to understand what effective questions could be asked of a Minister in relation to documents the non-disclosure of which itself prevented the questioner having any information on which to base his questions. In conclusion, the Minister observed that if we were setting up a new constitution he would not wish to quarrel with the proposition that the onus should be with those who asserted Crown privilege. As, however, we were not considering the position *de novo*, he pleaded that the House should watch how the Lord Chancellor's reforms develop and see whether his purpose has been fully achieved. The debate is therefore not closed but only adjourned.

To many people it still seems that the simple way to approach the matter is by direct attack. Classes of documents being departmental and inter-departmental minutes, correspondence and memoranda should not be the subject-matter for protection under Crown privilege on the grounds only that their disclosure would discourage freedom and candour of communication by civil servants. All other objections to production or relevance would, of course, remain available. In so far as litigants should endeavour to make political capital out of incidental disclosures of policy making or civil service practice the courts should be trusted to discourage such conduct even to the extent of stopping the "effective cross-examination" of which the Lord Chancellor seemed to be apprehensive but which having little or no evidential value served neither to contradict the evidence nor to impeach the credibility of a witness and thus in no way help to secure the administration of justice.

CONSTITUTIONAL EXPERIMENTS IN BRITISH WEST AFRICA

DENYS C. HOLLAND

THE Constitutions of British West African territories have changed, and even more, proposals for change have been made, with such bewildering frequency during recent years that the use of the word " experiments " in the title of this paper requires no justification and no explanation. Indeed so rapid is the rate of change that any recitation of, and commentary on, the existing provisions of the Constitutions of the Gold Coast, Nigeria, Sierra Leone and the Gambia would be a futile exercise. During 1957 the Gold Coast is to become independent under the name of Ghana, Nigeria is to have a constitutional conference which should be decisive in shaping its future constitutional progress, and Sierra Leone is to make constitutional changes which should be equally decisive. 1957 may well be the most important year yet in the history of British West African constitutional development. Clearly the existing Constitutions of West Africa are of so transitory a nature as to be of little importance. The important question is: " What shape are British West African Constitutions to take in the future? "

SELF-GOVERNMENT AND UNITY

The principle of self-government is now almost universally conceded so far as British West Africa is concerned. No serious opposition to the principle is to be met from any source outside West Africa itself. Even South Africa seems to have conceded the principle so far as African States are concerned; in the United Nations General Assembly South Africa voted in favour of the union of Togoland with an independent Gold Coast, the South African representative remarking that his country had every confidence that the Gold Coast would " carry on the best traditions originally developed by the U.K. Government in Togoland." The only serious opposition to self-government now comes not from without but from within West Africa itself. In other words, the constitutional problems are not now external but internal problems which self-government cannot solve but will indeed accentuate. These internal constitutional problems are many and varied, but all stem from the same fundamental cause—the lack of

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national unity in West African territories. As Sir Keith Hancock stated in his Cust Foundation lecture " Self-government assumes the presence of a ' self ' which exists as a social fact and can be translated into a political fact. If the population of a territory contains two or more deeply divided ' selves ' the forms of self-government are unlikely to produce the reality of self-government." So long as independence seems remote any lack of national unity may be submerged beneath the common desire to expel the intruder. Once independence becomes a foreseeable probability any latent hostilities and differences are exposed—a fact which is amply demonstrated by recent events in West Africa. National unity can only be achieved from within; it cannot be imposed from without. Nor indeed is delay in self-government likely to lead to a solution but rather to postpone any real attempt to deal with the problem. The reasons for this lack of unity are many and varied—cultural, historic conflicts, economic, tribal, and political.[1] Perhaps the main cause of disunity, however, is the political division between traditionalists and radicals, a division accentuated by the sharp change in the direction of British colonial policy from indirect rule to a centralised parliamentary democracy. That there are a number of different factors underlying national disunity is perhaps illustrated by the voting figures in the recent Gold Coast elections: —the C.P.P. polled just under 400,000 votes, obtaining 71 seats out of the 104 in the House of Assembly; the Opposition polled just under 300,000; these votes were split up in the different territories comprising the Gold Coast as follows: —In the Northern Territories the C.P.P. won 11 out of 26 seats, polling 66,000 votes, against the Opposition's 72,000 votes; in Ashanti the C.P.P. won eight seats against the Opposition's 13, polling 97,000 votes against the Opposition's 127,000. In the light of these figures the division can hardly be said to be, as is sometimes suggested, between Ashanti and the Northern Territories on the one hand and the Colony on the other, based solely on tribal and historic grounds.

Self-government *is* to be granted despite these fundamental differences and moreover self-government in the form of a parliamentary democracy. This makes the introduction of constitutional checks and devices to prevent oppression of minorities and infringements of liberty of the most obvious importance and it is, of course, over the nature of these checks and devices that much of the present internal controversy is raging in West Africa. Beneath the constitutional arguments of the Opposition in the Gold Coast and elsewhere is, however, it is suspected, a realisation that " unless the true democratic temper is present, the most beautifully devised political or economic machinery will result in nothing but slavery,"[2] and a consequent fear of independence in any form. In these circumstances differences over checks and devices are apt to become insoluble!

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[1] See pp. 90–100 of *The New West Africa*, ed. by Basil Davidson and Adenekan Ademola for further consideration of these factors.

THE GOLD COAST

The success or failure of the Gold Coast in devising satisfactory constitutional machinery after the British withdrawal may well set the pattern for constitutional progress elsewhere, and so this paper will be primarily concerned with that country. The Gold Coast is, of course, scheduled to become the independent State of Ghana on March 6, 1957, " unless before that date Her Majesty has by Order in Council appointed some other day to be the appointed day " under the Ghana Independence Bill. This Bill, which at the time of writing has passed the House of Commons, contains all the usual " Statute of Westminster powers " and in the main calls for no particular comment. Worthy of note, however, is the possibility envisaged in the Bill of a temporary continuation of protected persons status within Ghana after independence. This is by virtue of clause 2 which, after providing that citizens of Ghana under any citizenship law passed by the Ghana Parliament shall be British subjects or Commonwealth citizens and that the Northern Territories and Togoland shall be deleted from the Protected Persons Order, 1949, goes on to provide that protected persons of the Northern Territories and Togoland shall not cease to be protected persons until they become citizens of Ghana. But for this provision, of course, these protected persons would be stateless after March 6 until the Ghana Citizenship Act was passed. Another interesting provision is para. 6 of the First Schedule which provides that " the constitutional provisions shall not be repealed, amended or modified otherwise than in such manner as may be specified in those provisions." The expression " constitutional provisions " means the provisions of the Gold Coast (Constitution) Orders in Council, 1954–1956, and of any other Order in Council made *before* that day, or any law, or instrument made under a law, of the *Parliament of Ghana made on or after* that day, which amends, modifies, re-enacts . . . any of the provisions of any such Order in Council or of any such law or instrument previously made."

Apart from the above restriction the Ghana Independence Bill naturally leaves the details of the Ghana Constitution unspecified. At the moment the relevant provisions are contained in the Gold Coast (Constitution) Order in Council, 1954, as amended by Orders of 1955 and 1956.[3] The Gold Coast Prime Minister recently announced in the Gold Coast Assembly that he had recommended to the U.K. Government that the new Constitution Order in Council which will now be necessary should be based on provisions of the White Paper on the subject approved by the Gold Coast Assembly on November 14, last.[4] Whether the provisions contained in the White Paper, which must now be examined, will be accepted *in toto* remains yet to be seen. At one time the British Government appeared reluctant to intervene but the anxieties expressed from both sides of the House during the recent debate on the Ghana Independence Bill and the deep division which exists in the Gold Coast may have led to second thoughts on the matter. During the Commons debate various proposals were put forward for a visit to the Gold Coast by the Colonial Secretary and/or a parliamentary delegation.[4a] One thing at least seems clear and that is that the demands made by the N.L.M. and the N.P.P. for secession for Ashanti and the Northern Territories will not be conceded. Not only has the Colonial Secretary rejected the notion of handing over power to any body other than the Government of a united Ghana but the Ghana Independence Bill itself makes this clear in clause 1. Before looking at the constitutional provisions proposed by the Gold Coast Government and the differences of opinion which have arisen, one final feature of the Ghana Independence Bill is perhaps worthy of mention and that is the long title, which is " An Act to make provision for, and in connection with, the attainment by the Gold Coast of fully responsible status *within the British Commonwealth of Nations*." It has, of course, been repeatedly affirmed by the U.K. Government that Membership of the Commonwealth is a matter for all Members of the Commonwealth, not merely for the U.K. Government, but during the debate on the Bill, Lord John Hope stated that: " we have every hope that Ghana will become a full member."

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[2] *Education for Citizenship in Africa* (1948).

[3] S.I. 1954 No. 551, as amended by S.I. 1955 No. 1218 and 1956 No. 997.

CONSTITUTIONAL PROPOSALS OF THE GOLD COAST GOVERNMENT

To turn at last to the details of the constitutional proposals of the Gold Coast Government, these must be briefly stated before dealing with the main points of dispute. The main proposals are as follows: — (1) That Ghana should be a Member State of the Commonwealth. (2) That the name of the country be Ghana. (According to a recent memorandum from the Gold Coast Prime Minister to heads of Gold Coast Government Departments the inhabitants of the country should be described as "Ghanaians.") (3) The constitutional conventions existing in the U.K. regulating the exercise of the functions of Her Majesty should be adopted in Ghana by the insertion in the Constitution of a provision similar to that in the Ceylon Constitution. This, of course, would involve writing the conventions into the Constitution subject to a proviso that any breach should not be questionable in a court of law.[5] (4) There should be a Governor-General, appointed for a period of five years on the advice of the Gold Coast Government, who would act on the advice of the Gold Coast Government and appoint and dismiss Ministers on the advice of the Prime Minister; his salary would be statutory and not diminished during his period of office. (5) The power of pardon should be vested in the Governor-General. (6) Supreme legislative power should be vested in Parliament consisting of the Queen and the Assembly (to be known as the National Assembly). Under the existing Constitution the legislature cannot pass laws making "persons of any racial community liable to disabilities to which persons of other such communities are not made liable." Since the present proposals state that: "Except where it is otherwise stated the provisions in the existing Constitution are to remain in force," the question may arise whether the expression "supreme" is meant to imply the removal of this restriction on legislative power. (7) The life of the National Assembly should be five years (instead of four as at present) and this should apply to the existing Assembly elected on July 17, 1956. (8) Executive powers relating to the public service should be vested in the Governor-General acting on the advice of the Government. The existing Public Service Commission should be retained to exercise such functions as may be delegated to it and to advise the Government on any matters referred to it. This may be reasonably described as one of the most disturbing of the proposals made by the Gold Coast Government. Under the existing Constitution the control of public officers is vested in the Governor acting on the recommendation of the Public Service Commission,[6] and in the original Constitutional Proposals for Gold Coast Independence published last April the Gold Coast Government had recommended the continuation of this system.[7] Now under the Revised Proposals the Gold Coast Government is suggesting that control of the public service should be transferred from the non-political Public Service Commission to Ministers. Similarly with the judiciary, the existing Constitution provides that apart from the Chief Justice (appointed by the Governor after consultation with the Prime Minister) all members of the judiciary shall be appointed by the Governor on the recommendation of the Judicial Service Commission,[8] and in their proposals of last April the Gold Coast Government had not recommended any change in this system apart from the Chief Justice being appointed on the advice of (instead of after consultation with) the Prime Minister. Now the Gold Coast Government propose that the Commission should only function in relation to judicial officers below the rank of judges of the Supreme Court; the latter should, like the Chief Justice, be appointed by the Governor-General on the advice of the Prime Minister. In relation to these disturbing proposals, the Colonial Secretary stated in the House of Commons debate on the Ghana Independence Bill: " It seems to me and to my colleagues in the U.K. Government that, except for the Chief Justice and a few of the most senior Civil Service posts, the final authority after independence should lie with the respective Commissions, the Public Service Commission and the Judicial Service Commission. I very much hope that this view will be shared on reflection by the Government of the Gold Coast." It is very much to be hoped that these remarks bear fruit. To continue with an enumeration of the proposals after that digression into comment which could not be postponed: —(9) The appeal powers of the Judicial Committee of the Privy Council should be retained. (10) The Gold Coast Government to have full control of Defence and External Affairs; the police to be decentralised to some extent but final control to remain with the Central Government. (11) The Constitution to be amended only with the consent of a two-thirds majority of all Members of Parliament; this is a variation on the April Proposals, which suggested two-thirds of the members *present and voting*. (12) There should be a certain measure of devolution from the Central Government to Regional Assemblies. These Regional Assemblies should have powers similar to those of the London County Council but those powers should be introduced gradually. Since it is over the question of Regional devolution that the deepest divisions of opinion have arisen between the C.P.P. and the N.L.M., these Government proposals will be considered later. (13) Legislation should be enacted providing that all citizens of the Gold Coast should have the same status regardless of whether their citizenship derives from the Colony, Ashanti, the Northern Territories or Togoland. (14) The Constitution ultimately should contain full guarantees of Fundamental Rights as in the Indian Constitution. The

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[4] *The Government's Revised Constitutional Proposals for the Gold Coast Independence*, obtainable from the Crown Agents for Overseas Governments and Administrations, price 6d.

[4a] Since this paper was written Mr. Lennox-Boyd has visited the Gold Coast at Dr. Nkrumah's invitation.

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[5] For a discussion of the purpose and effect of this, see pp. 70–71 of the *Dominion of Ceylon* by Sir Ivor Jennings and H. W. Tambiah (Vol. 7 of *The British Commonwealth; the development of its laws and constitutions*).

[6] See s. 56 of and Part I of the Third Schedule to the Gold Coast (Constitution) Order in Council, 1954, S.I. 1954 No. 551 (which came into force on July 31, 1955), as amended by S.I. 1955 No. 1218.

[7] See *Constitutional Proposals for Gold Coast Independence*, p. 2.

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[8] See ss. 60, 62 and 63 of and Part II of the Third Schedule to the Gold Coast (Constitution) Order in Council, 1954, S.I. 1954 No. 551 (which came into force on July 31, 1955), as amended by S.I. 1955 No. 1218.

White Paper states that whilst both the Gold Coast Government and Opposition wished to include in the Constitution itself guarantees of the right of personal liberty, freedom of speech and Press, and the right of political and industrial association, the British Government had taken the view that these were matters to be put into the Constitution only after independence. Mr. James Griffiths has now suggested [9] a compromise, namely, that whilst the legislation should be passed only after independence, details of the proposed provisions should be embodied in a White Paper which could be debated and accepted before independence, and in consequence the Colonial Secretary has promised to have another look at the matter.[10] One right is already guaranteed in the Constitution, namely, the right to adequate compensation for property compulsorily acquired for the public use, and the Gold Coast Government recommend the retention of this provision. The relevant section is section 36A of the Gold Coast (Constitution) Order in Council, 1954,[11] which provides that no property shall be acquired compulsorily except under the provisions of a law which of itself or when read with any other law in force in the Gold Coast (i) requires the payment of adequate compensation, (ii) gives to any person claiming such compensation a right of access for the determination of his rights, including the amount of compensation, to the Supreme Court of the Gold Coast, and (iii) gives the same right of appeal from the Supreme Court as is given generally to parties to civil proceedings in that court; this provision does not, however, affect the operation of any existing law, and is subject to a number of obvious exceptions relating to the enforcement of taxes, the execution of court orders, etc. (15) Finally, the Gold Coast Government's Revised Proposals recommend certain electoral provisions, namely, (i) the establishment of a Delimitation and Electoral Commission; (ii) the continuation of single-member constituencies, containing a population of approximately the same size, but so that no constituency should be partly in one Region and partly in another; (iii) that the franchise should be exercisable by all Ghana citizens of full age who are not subject to legal incapacity and whose names are on the Register of Electors; (iv) that the ballot should be secret and matters concerning elections subject to impartial supervision. It is, however, unlikely, so it is said, that all these electoral provisions would be in the Constitution itself.

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[9] In the House of Commons debate on the Ghana Independence Bill.

[10] For an examination of Fundamental Rights under the Indian Constitution, see pp. 160–172 of *The Republic of India* by Alan Gledhill (Vol 6 of *The British Commonwealth; the development of its laws and constitutions*).

[11] See s. 3 of the Gold Coast (Constitution) (Amendment) Order in Council, 1955, S.I. 1955 No. 1218.

DIFFERENCES BETWEEN THE GOLD COAST GOVERNMENT AND OPPOSITION

The points of difference over the above proposals which have arisen between the Gold Coast Government and Opposition, and which must be now examined, are due to the belief of the Opposition that the C.P.P. leaders are dictatorial and corrupt, that the C.P.P. is colony-dominated and likely to oppress or neglect Ashanti and the Northern Territories, and that the C.P.P. is an enemy of chiefdom. The main constitutional proposals of the Opposition, based upon the above fears, are: —(1) Provision should be made in the Constitution for the establishment of a Council of State consisting of the Governor-General, the four Heads of the territories comprising the Gold Coast—that is, Ashanti, the Colony, the Northern Territories and Togoland—the Prime Minister, the Leader of the Opposition and the Attorney-General. This Council of State would advise the Governor-General on such matters as the appointment of members of the Public Service Commission, the appointment of judges, and local constitutional matters. The desirability of securing such matters from the possibility of political interference would probably be generally conceded and the fears that the C.P.P. might be guilty of such interference may be said to be not altogether unreasonable in the light of the Government's proposals commented on above. However, although the Civil Service and Judiciary should be free from arbitrary Government interference, it would clearly be equally, if not more, intolerable for them to be subjected to the control of the Opposition, and it may be questioned whether the Opposition's proposal for a Council of State might not have this effect so long as the C.P.P. remain in power. The formulation of a provision securing the Civil Service and Judiciary against political interference of any sort is obviously exceedingly difficult, and much must necessarily depend upon tradition and public opinion. If, for example, the Civil Service are controlled by a Public Commission, the question must arise: " Who is to control that Commission? " Under the existing Constitution, the members of the Public Service Commission are appointed by the Governor after consultation with (but not necessarily on the recommendation of) the Prime Minister. After independence the Gold Coast Government propose that " this should be the responsibility of the Government of the day." Nobody would deny that the Government of the day must be able to rely on the Civil Service to implement its policy decisions. The necessary corollary of non-Governmental interference with the Civil Service is the impartiality of the Civil Service. How these two ideals can both be secured by law is difficult to see.

A Second Chamber

(2) The next important constitutional proposal of the Opposition is the establishment of a Second Chamber. It should be composed, the Opposition originally suggested, of "members elected by the four territorial houses of chiefs and members appointed by the Government and of members appointed by the Governor-General, acting on the advice of the Council of State." Later the Opposition modified this view by stating that the Second Chamber should not be purely a chiefly body but that it would include elder statesmen, and, if need be, part of its membership could be based on direct election. Clearly the type of Second Chamber envisaged is one primarily of a conservative character and representative of traditional authority. The Second Chamber question in the Gold Coast, coupled with the future of the Chiefs, has been discussed *ad nauseam* since 1949 and it is difficult to imagine anything new being said at this stage. The history of the matter may, however, be worth repeating here in outline. In 1949 the Coussey Committee [12] by 20 votes to 19 recommended the establishment of a Second Chamber composed primarily of Chiefs, with powers corresponding to those of the House of Lords. The arguments which the Committee produced for and against a bicameral legislature touched upon most of the familiar points made by political theorists, and in addition included one or two practical arguments which are usually ignored by political theorists. In the event it was the practical reasons advanced against a Second Chamber which weighed with the Colonial Secretary, namely, the effect on the number and quality of members available for a First Chamber, the stagnation in local affairs which would be affected by the absence of many Chiefs, and the beneficial effect of Elders and elected members meeting in the same Assembly. A further practical argument against the establishment of a Second Chamber is the expense involved, as the Coussey Committee had pointed out. The obviously realistic nature of these reasons for a unicameral legislature needs no stressing. In the event, then, a Second Chamber was not established. However, when the Gold Coast Government later proposed removing the chiefly representatives from the Assembly, the whole question of a Second Chamber required fresh discussion. Accordingly, in 1952, the Gold Coast Prime Minister invited the opinions of all and sundry on the Second Chamber question. In the Government's Proposals for Constitutional Reform, published in 1953,[13] it was reported that of all the hundred or so bodies which had expressed opinions, only the C.P.P. and six other bodies were in favour of a single chamber.

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[12] Colonial No. 248 of 1949, published by H.M. Stationery Office.

[13] Obtainable from the Crown Agents for Overseas Governments and Administrations, price 2s.

None the less the Government stated there is " reason to believe . . . that public opinion has changed since the representations . . . were written "—an extraordinarily good argument, one would have thought, *for* a Second Chamber which gives time for such second thoughts. The Gold Coast continued with a unicameral legislature; the Opposition continued to press for a Second Chamber. In its Revised Constitutional Proposals the Gold Coast Government now state that the *only* advantage of a Second Chamber is the time it would give for reflection and revision and that this can be more effectively achieved by the proposal made in its April White Paper for one month's delay between publication and introduction of a Bill in the Assembly. The Government none the less states that it is prepared to agree to a Second Chamber in place of the Regional Houses of Chiefs (considered below), but the Opposition have rejected this compromise. No useful purpose would be served here by going over all the familiar arguments again, but attention may perhaps be drawn to the rather naive argument recently advanced by Dr. Danquah that the necessity for a Second Chamber is evident from the fact that every Commonwealth country, save New Zealand, considers one indispensable.[14] The introduction of such obviously fallacious arguments can only weaken the Opposition's case.

Regional Devolution

(3) The next major point of difference is over the question of regional devolution. It is now quite clear that neither the Gold Coast Government nor the U.K. Government is prepared to concede a federal form of constitution. The Gold Coast will be a unitary State (unless, of course, force brings about a different solution), but it is now generally agreed that a certain measure of regional devolution is necessary, and it remains to be seen whether this having been conceded a compromise can be reached. The Gold Coast Government proposal is, briefly, that the Gold Coast should be divided into Regions, in each of which a Regional Assembly and a House of Chiefs shall be established. The proposed functions of the Regional Assemblies are not clearly defined in the Revised Proposals but it is stated they would be mere delegates of the central Parliament although their abolition and alterations in their composition and functions would require a two-thirds majority of the members present and voting in the National Assembly; further, they would have no power to raise revenue. The functions of the Houses of Chiefs would apparently be advisory relating to such matters as African customary law and the traditional functions and privileges of Chiefs. The Opposition object to the Central Legislature having the power to alter the composition and functions of the proposed

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[14] See *West Africa*, January 5, 1957.

Regional Assemblies and wish the Assemblies to have wider powers than those envisaged by the Government. They have stated that they are prepared to accept a position whereby the Regional Assemblies would have powers approximating to those of the Northern Ireland Parliament in law and by convention, rather than county councils, but this the Gold Coast Government have not so far been prepared to concede. It is apparent that as at present proposed the Regional Assemblies and Houses of Chiefs would be completely dependent upon the goodwill of the Gold Coast Government and this is obviously the hub of the dispute. It is, of course, true that once established they are not to be altered or abolished except by a Bill passed by a two-thirds majority of the members present and voting in the National Assembly, but with party strengths as they are at present in that body this can be no real safeguard.[15]

Constitutional Amendment

(4) This question of party strengths leads to the last major point of difference between the parties, the question of constitutional amendment. Since the C.P.P. holds 71 out of the 104 seats in the Assembly, it is clear that the Government proposal that constitutional amendments should require a two-thirds majority of the Assembly provides no safeguard for the Opposition at the moment, and, of course, it is proposed that the life of the present Assembly should be five years as from July 17, 1956. This two-thirds majority which the C.P.P. at present enjoys could, of course, easily disappear as a result of by-elections in the meanwhile—unless it is suspected that elections might disappear from the constitutional scene immediately after independence. The Opposition's proposals for constitutional amendment involve the acceptance of other proposals which the Government have already rejected. In particular, the Opposition suggest that constitutional amendments should require a two-thirds majority of the members of both Houses of Parliament sitting together and the concurrence of a two-thirds majority also sitting together of the Territories Legislatures in a majority of the four Territories. In addition if the amendment affects a Territory, the Territory concerned should have accepted the proposed amendment by a two-thirds majority of both Houses of the Territorial Legislature sitting together. The dependence of this proposal upon the establishment of a Second Chamber and the devolution of considerable powers to the Regions obviously makes it unacceptable to the Gold Coast Government. A possible compromise, however, might be the adoption of a referendum

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[15] For fuller details of the suggestions for regional devolution, see the *Report of the Constitutional Adviser*, 1955 (the Bourne Report), and *Constitutional Proposals for the Gold Coast Independence*, 1956, both obtainable from the Crown Agents.

provision similar to that in the Australian Constitution with the substitution of Regions for states. This would satisfy the Opposition's desire for a two-tier approach and provide some safeguard for the Regions.

It has not been possible here to do more than touch upon the surface of the many and varied constitutional problems arising in the Gold Coast. It is obvious, however, as has been recently pointed out [16] that " the Opposition distrust the Government so deeply that they would feel safe only with a Constitution containing so many checks and balances as to hamper seriously the exercise of power by any party with a majority in the Assembly." Whether they would then be safe, if their fears be justified, may well be doubted in the light of recent events in the Union of South Africa where the futility of constitutional restrictions in the face of a determined party has been amply demonstrated. The only realistic solution to the constitutional problem is one based upon toleration, moderation and mutual understanding, rather than upon legal draftsmanship.

NIGERIA

Nigeria, like the Gold Coast, is a country divided against itself, a situation which makes the drafting of a Constitution satisfactory to all parties a particularly difficult problem. In the case of Nigeria, of course, the problem is not fundamentally one of form, as it is in the Gold Coast, since Nigeria is already committed to a federal form of constitution, although many problems of detail have arisen and will doubtless arise in the future. The immediate problems concern the speed of progress of Nigeria to self-government since all Regions of Nigeria are not equally willing or ready for self-government at the same time. Accordingly, the Secretary of State for the Colonies informed the Constitutional Conference held in London in 1953 [17] that H.M.'s Government were not " prepared to fix a definite date for self-government for Nigeria as a whole, the more so as the Northern delegation, representing over half the population of Nigeria, was unable to depart from its policy of self-government as soon as practicable." The Conference eventually accepted a declaration of policy that in 1956 H.M. Government would grant to those Regions which desired it " full self-government in respect of all matters within the competence of the Regional Governments with the proviso that there should be safeguards to ensure that the Regional Governments did not act so as to impede or prejudice the exercise by the Federal Government of the functions assigned to it now, or as amended by agreement in the future, or in any way make the continuation of federation impossible." For reasons which are well known it was not possible to implement the above promise in 1956,[17a] but the Colonial Office has now announced that the Nigeria Constitution Conference will be held in May "or in any event not later than mid-June 1957," and at this Conference, the Colonial Secretary has announced, the British Government will be willing to grant self-government to any Region which wants it "subject to the proviso that there shall be safeguards for the Federal Government's functions and the continuation of federation, and to settlement of various details necessary to implement the proposals of 1953." The Northern People's Congress has already announced that it regards 1959 as the earliest date for self-government and if this date is adhered to, it seems clear that the two problems before the Nigerian Conference will be (i) to reconcile Regional self-government with the continuation of Federal dependency, and (ii) to prepare for Federal self-government by 1959. The Western Region Government have so far concentrated upon the first problem and the Eastern Region Government on the second.

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[16] See *West Africa*, November 24, 1956.

[17] Cmd. 8934 of 1953.

Proposals of the Western Region Government

The Federation of Nigeria is defined in the Nigeria (Constitution) Order in Council, 1954,[18] as comprising the Northern Region, the Western Region, the Eastern Region, the Southern Cameroons and the Federal Territory of Lagos. Of the three Regions which have been promised Regional self-government this year, if they so desire, only the Western Region Government have so far issued any detailed proposals [19] for implementing this promise. Since Regional self-government will presumably be the first item on the agenda, it is reasonable to begin from these proposals in trying to foresee Nigeria's constitutional future. The problem which Chief Awolowa's proposals try to answer is how to reconcile the self-government of a Region with its membership of a Federation which is not self-governing in such a way as not to prejudice the continuation of federation or of the federal government.

One obvious necessity for Regional self-government is the removal of the reserve powers of the Governor, in both the executive and the legislative sphere, and the removal of the powers of the Colonial Secretary over Regional legislation. However, there clearly may be circumstances in which the Governor is the only safeguard against the

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[17a] Since the writing of this paper the Report of the Tribunal of Inquiry whose deliberations led to the postponement of the proposed 1956 Conference has been published (Cmnd. 51).

[18] s. 3 of S.I. 1954 No. 1146.

[19] Sessional Paper No. 3 of 1955, obtainable from the Crown Agents for Overseas Governments and Administrations.

Regional Government acting in such a way as to prejudice the Federation as a whole. The Western Region Government accordingly suggests the limitation of the Governor's powers to circumstances in which the Federation may be said to be so threatened. It is proposed that the Governor should be appointed by the Crown, after consultation with the Prime Minister, and hold office for a period of five years; that he should cease to attend meetings of, and cease to control the agenda of, the Executive Council; and that generally he should observe the same conventions as does the Sovereign in relation to the U.K. Government. His present power to act against the advice of the Government and to legislate where public order, public faith, or good government so require would not, however, be completely abolished, but would be confined to the following purposes: —(i) for the protection of the interests of members of the public service for whom the Colonial Secretary retains responsibility, *i.e.*, members of the Overseas Civil Service; (ii) for ensuring the carrying on of government where the Government breaks down because, for example, there is no party able to form an effective government, or where there is grave threat to financial stability with which the Government is unable or unwilling to cope. In exercising these powers " the Governor would necessarily have to be empowered to act in his discretion " and clearly the success of such an arrangement would depend a great deal on the calibre of the particular Governor. This arrangement seems a reasonable compromise but it seems to be a gross misuse of language to speak of self-government where a Governor appointed not necessarily on advice, but merely after consultation, is empowered to act against the wishes of the chosen Government of the people. Like " democracy," " self-government " may suffer from such misuse of language.

The remaining proposals in the Western Region Government's paper are relevant only to Regional self-government and do not affect the question of relations with the Federation, save possibly for the proposal concerning constitutional amendment. It is proposed that the power to amend the Constitution should be vested in the Regional Legislature subject to the requirement of a two-thirds majority of the members of both Houses. It is conceivable that an amendment of the Western Region Constitution might have some effect on the Federation as a whole—if, for example, the Governor's reserved powers were to be completely abolished by this means. But presumably some safeguard against this is intended. The remaining proposals deal with the independence of the public service and the judiciary, the abolition of the power to reserve bills and disallow bills, a change in the nature of the office of Attorney-General so that he ceases to be a public officer and takes a seat in the Cabinet, the abolition of the power of the U.K. to legislate for the Region within the sphere of the Regional

Legislature's competence except with the consent of the Region, and the abolition of the repugnancy rule so far as Regional legislation is concerned.

The above proposals may well, of course, have to be modified in the light of suggestions made by the other delegations to the coming Conference. The Eastern Region Government have, for example, already proposed [20] changes in the basis of revenue allocation to the Regions, a matter which may well impinge on Regional self-government. Changes on the exclusive and concurrent legislative lists also seem likely and this may affect Regional self-government.

The Eastern Region Government has similarly made proposals in a Sessional Paper [20] on the question of self-government, but these proposals are more concerned with the question of self-government for the Federation as a whole than with Regional self-government. On the basis that Northern objections will mean the postponement of Federal self-government until 1959 the Eastern Region Government propose that the Federation should seek *internal* self-government at the forthcoming Conference, leaving the U.K. responsible for defence and external affairs, and to a limited extent, internal security, only. It is apparent that the Eastern Region Government is interested primarily in Federal self-government and with this in mind intends to press for a stronger central government, with, for example, the transfer of residual power from the Regions to the Federation. As a matter of terminology, which may be of some significance, it is proposed by the Eastern Region Government that the Federal Government should no longer be called " Federal " but merely the Government of Nigeria. The question of replacing the existing Regions by smaller state units is another matter which Dr. Azikiwe's Government wishes placed on the agenda for the London Conference. It is apparent that a conflict may arise at the forthcoming Conference between Western interest in Regional self-government and Eastern interest in Federal self-government, a conflict which could make the promise of Regional self-government incapable of fulfilment.[21]

GAMBIA AND SIERRA LEONE

Meanwhile the precise constitutional direction which will be taken by Sierra Leone and the Gambia cannot be said to be finally settled. Much may depend upon the success or failure of the Ghanaian and Nigerian experiments. From time to time suggestions have been made that the

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[20] Sessional Paper No. 5 of 1956, obtainable from the Crown Agents for Overseas Governments and Administrations.

[21] This suggestion is based on the assumption that the Eastern Region Government is returned to power in the general election which has been announced since the writing of this paper.

Gambia, and perhaps Sierra Leone, are incapable of completely independent self-government, and therefore will ultimately seek either integration with the U.K. or federation with other West African territories. In view of the difficulties now being experienced in achieving unity within the smaller units of Nigeria and the Gold Coast, the prospects for a wider federation of West African territories would seem remote, and indeed successful self-government in the Gold Coast and Nigeria is obviously a necessary prelude to any such scheme for wider federation.

CURRENT SURVEY

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This digest, which has been compiled by the Editor, covers the period from October 1, 1956, to December 31, 1956.

UNITED KINGDOM

AGRICULTURE

British Egg Marketing Scheme, 1956

See INQUIRIES (p. 60, below).

CONTRACT

See LOCAL GOVERNMENT, **Contract** (p. 61, below).

COURTS

Administration of Justice

Statutory amendment. The Lord Chancellor has appointed January 1, 1957, as the day for the coming into force of sections 1–8, 26–31, 32 (4), 34, 35, 37, 39, 41 and 56 of the Administration of Justice Act, 1956 (see [1956] P.L. 369) (S.I. 1956 No. 1979).

Legal Aid

Report. The 6th Report of the Law Society of Scotland for 1955–1956 has been published by the Scottish Home Department (H.M.S.O. 49–373–6).

CRIMINAL LAW

Statistics

Report. The statistics relating to crime and criminal proceedings for 1955 in England and Wales have been published (Cmd. 9884).

EDUCATION

Scotland

Statutory amendment. The Education (Scotland) Act, 1956 (4 & 5 Eliz. 2, c. 75) received the Royal Assent on November 5, 1956. Section 1 empowers an education authority to undertake certain road works for the safety of pupils; section 2 amends section 7 of the Education (Scotland) Act, 1946; section 3 relates to attendance enforcement; section 4 amends section 43 of the Act of 1946; section 5 replaces section 45 of the Act of 1946; section 6 relates to dental treatment; section 7 discontinues section 62 of the Act of 1946; section 8 replaces section 75 of the Act of 1946; section 9 replaces section 77 of the Act of 1946; section 10 replaces section 101 of the Act of 1946; section 11 replaces section 122 of the Act of 1946; section 12 replaces section 124 of the Act of 1946. Minor and consequential amendments are contained in Sched. I. The Act came into force one month after its passing.

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Civil Service

Commission. The C. S. Commissioners have issued their 90th Report for 1955–1956 (H.M.S.O. 25–1–0–56).

Staffs employed. A statement has been issued showing the numbers of the Civil Staffs employed in Government Departments on October 1, 1956, as compared with July 1, 1956. It shows a total of 639,308 (including 253,156 Post Office staffs) on the later date, which is a decrease of 177 (Cmnd. 25; see also [1956] P.L. 371).

Inspectorate

Factories. The Annual Report of the Chief Inspector of Factories for 1955 has been published (Cmnd. 8). A White Paper has been published giving the results of a survey carried out by an Under-Secretary of the Ministry of Labour and National Service, the Director of Organisation and Establishments and the Chief Inspector of Factories into the work, staffing and organisation of the inspectorate, and containing a statement of Ministerial decisions which followed (Cmd. 9879).

Ministers' Functions

Report. The Annual Report of the Ministry of Housing and Local Government for 1955 has been published. It deals with housing, local government, water and sewerage, planning, mineral working, new towns, local government finance, and Wales. There are eighteen Appendices. The Introduction draws special attention to the revision of housing subsidies, slum clearance plans, the building of new houses, derequisitioning, new valuation lists, the economies in expenditure required, local government organisation and finance, the Clean Air Act and other matters (Cmd. 9876).

Trading Accounts and Balance Sheets of trading or commercial services of Government Departments for 1955–1956, together with the report of the Comptroller and Auditor-General thereon, have been published (H.C. 18 of 1956–1957).

New Towns

Employees. In a debate on the Adjournment, the House of Commons considered the dismissal of one of the temporary staff of East Kilbride Development Corporation on the ground that her work was incompatible with her adoption as prospective Parliamentary candidate for the electoral division in which the new town was situated. Her work on a social survey involved house to house visitations (561 H.C. Deb. 839–850, November 30, 1956).

Reports of Aycliffe, Basildon, Bracknell, Corby, Crawley, Cwmbran, Harlow, Hemel Hempstead, Peterlee, Stevenage, Welwyn Garden City, and Hatfield Development Corporations for 1955–1956, have been published (H.C. 365 of 1955–1956).

Research

Department of Scientific and Industrial Research. The D. S. and I. R. Act, 1956, came into force on November 7, 1956 (S.I. 1956 No. 1697; for the Act, see [1956] P.L. 373). The Parliamentary Secretary to the Ministry of Works, representing the Lord President of the Council, gave the names of the members of the Council for Scientific and Industrial Research (Chairman: Sir Harry Jephcott) (559 H.C. Deb. *1*, November 7, 1956).

Return of Land

The Minister of Agriculture, Fisheries and Food has offered former owners of land at Marchwiel, Denbighshire, about 1,600 acres out of an area of 2,400 acres which was purchased compulsorily at the beginning of the Second World War for the construction of an ordnance factory. This is in accordance with the Government's policy of offering back to former owners land which it has compulsorily acquired and no longer needs.

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (pp. 75–76, below), WALES (p. 76, below).

HOUSING

Census, 1951

Report. The Housing Report for England and Wales has been published by the General Register Office.

Subsidies

Abolition. An Order has been made abolishing (with exceptions) the Exchequer subsidy payable under section 3 (2) of the Housing Subsidies Act, 1956, for houses and flats for general needs provided by, or by arrangement with, local authorities in pursuance of action taken on or after November 2, 1956. The existing Exchequer subsidies under section 3 (2) of the Act will remain payable in respect of approved one-bedroomed houses and flats (Article 3 (2) of the Order). An Exchequer subsidy of a nominal amount of one shilling will be payable in respect of approved dwellings which satisfy any of the conditions mentioned in Article 3 (3) of the Order, being conditions which permit of the payment of certain additional subsidies by virtue of sections 4 and 5 of the Act (S.I. 1956 No. 2015). For a debate, see 562 H.C. Deb. 701–762, December 13, 1956.

INQUIRIES

Marketing scheme

The Minister of Agriculture, Fisheries and Food, the Secretary for Scotland and the Home Secretary laid the Draft British Egg Marketing Scheme before both Houses of Parliament on November 8, 1956 (see also [1956] P.L. 173, 375). For debates, see 562 H.C. Deb. 329–396, December 11, 1956; 200 H.L. Deb. 1316–1328, December 20, 1956.

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (pp. 75–76, below).

LOCAL GOVERNMENT

Audit

Objection. Three local government electors (two shopkeepers and a licensee) objected before the district auditor to the accounts for 1955–1956 of the Urban District Council of Barnet. A contract was made between the council and a company for the reconstruction of the High Street, Barnet. By a supplementary condition, the company bound themselves to complete works to the value of £20,000 before April 1, 1956. On March 24, 1956, the council paid the company £1,763 representing the value of the works carried out. The objectors contended that this sum should not have been paid. The district auditor rejected the objection on the grounds, *inter alia*, (1) that the whole of the expenditure incurred by the council had been or would be reimbursed by the Hertfordshire County Council and that payment of the Ministerial grant was made to the county council; (2) that the council had statutory authority to incur the expenditure of £1,763 which was made under a certificate of value given by the Engineer, which was in respect of a debt legally due from the council and which was not contrary to law (clxviii *The Estates Gazette* 581).

Children

The Home Office has published particulars of the number of children in the care of local authorities in England and Wales in March, 1956, the manner of their accommodation, and the estimated costs of maintenance. The total number of children is 62,347 of whom 45 per cent. are boarded out (Cmd. 9881).

Contract

Seal. Section 74 (2) of the Law of Property Act, 1925, provides: "The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation." Section 266 of the Local Government Act, 1933, provides: "(1) A local authority may enter into contracts necessary for the discharge of any of their functions. (2) All contracts made by a local authority or by a committee thereof shall be made in accordance with the standing orders of the local authority, and in the case of contracts for the supply of goods or materials or for the execution of works, the standing orders shall . . . (*b*) regulate the manner in which such notice shall be published and tenders invited: Provided that a person entering into a contract with a local authority shall not be bound to inquire whether the standing orders of the authority which apply to the contract have been complied with, and all contracts entered into by a local authority, if otherwise valid, shall have full force and effect notwithstanding that the standing orders applicable thereto have not been complied with." Neither of these statutory provisions affects the common law rule as to the necessity (save in exceptional cases) of a seal to bind a corporation. The mere fact that a corporation complies with its standing orders does not mean that its seal is no longer necessary to bind it or to confer contractual rights upon it. Section 74 (2) of the Law of Property Act, 1925, can only apply to the execution of an agreement which would be binding on the corporation in spite of the absence of a seal.

Quaere, whether a contract which does not exceed £50 requires a seal.

The plaintiffs claimed damages for breach, by repudiation, of contract. The defendant pleaded as a preliminary point of law that it was a body corporate, incorporated by Royal Charter dated August 27, 1937, and that as the contract in question was not under seal it was not binding on it. *Held*, the contract not falling within the well-recognised exceptions where a seal was not necessary, the defence must succeed: A. R. WRIGHT & SON *v*. ROMFORD BOROUGH COUNCIL [1956] 3 W.L.R. 896, Lord Goddard C.J.

Finance

Borrowing. The rates of interest chargeable on loans for more than five years advanced from the Local Loans Fund from October 20, 1956, have been raised to 5¾ per cent. The rate of interest on loans for not more than five years remains unchanged (S.I. 1956 No. 1638, revoking S.I. 1956 No. 958, see [1956] P.L. 256).

For a debate on the restriction on borrowing without Ministerial consent in Scotland, see the Committee stage of the Expiring Laws Continuance Bill (560 H.C. Deb. 1689–1701, November 20, 1956).

Expenditure. The Minister of Housing and Local Government stated in a circular of October 10, 1956, that his intention severely to restrict loan sanctions for at least six months from February, 1956, must continue to operate "for the present, and until further notice" (Circular No. 55/56).

Review. The Minister of Housing and Local Government stated that he would be making a statement after the Christmas Recess on the Government's review of local government finance but that three problems needed immediate attention. A Bill would be introduced the next day to deal with (1) the adjustment of rate contributions from State-owned gas, electricity and transport industries; (2) the fact that the present method of calculating Exchequer equalisation grant takes no account of the relief from rates given to charitable and educational bodies; (3) the rating of shops, offices and certain other property—this was to be reduced by 20 per cent. (562 H.C. Deb. 1475–1480, December 20, 1956).

Statistics. The Ministry of Housing and Local Government has published the Local Government Financial Statistics for England and Wales for 1954–1955 (H.M.S.O. 75–10–0–55).

Members

Voting rights. The case of *Brown* v. *D. P. P.* was considered by the House of Commons in a debate on the Adjournment (560 H.C. Deb. 245–254, November 7, 1956; see [1956] P.L. 257–258).

Reorganisation

Government proposals. The Association of Municipal Corporations have issued a memorandum on the White Paper (Cmd. 9831; see [1956] P.L. 377). They state, *inter alia,* that they are willing to accept the broad approach therein described but cannot give a final decision until the Government's proposals for allocating functions and provisions of adequate financial resources are made known (and see *The Times,* December 24, 1956).

See also EDUCATION (p. 58, above), HOUSING (p. 60, above), PUBLIC HEALTH (p. 74, below), TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (pp. 75–76, below), WALES (p. 76, below).

MONOPOLIES AND RESTRICTIVE PRACTICES

Monopolies Commission

Membership. The reconstitution of the Monopolies and Restrictive Practices Commission under the title of the Monopolies Commission took place on October 31, 1956 (S.I. 1956 No. 1649). The Commission consists of a full-time chairman (Mr. R. F. Levy, Q.C.) and seven part-time members (560 H.C. Deb. *111*, November 23, 1956).

References. The President of the Board of Trade stated that he intended to refer to the Commission (1) the supply of cigarettes and manufactured cigarette and pipe tobacco; (2) the supply of machinery for the manufacture and packaging of cigarettes and of cigarette and pipe tobacco; (3) the supply of certain electrical equipment for motor-vehicles. The Commission already has before it a reference on chemical fertilisers which was made on October 29, 1955 (560 H.C. Deb. *111*, November 23, 1956).

Restrictive Trading Agreements

Registration. Regulations have been made specifying the procedure to be followed in furnishing particulars of agreements subject to registration under Part I of the Restrictive Trade Practices Act, 1956, by virtue of orders made by the Board of Trade under section 9 and containing provisions relating to the contents and inspection of the register of those agreements (S.I. 1956 No. 1654). The Registrar of Restrictive Trading Agreements has issued a Guide to the Registration of Agreements under Part I of the Act of 1956 (H.M.S.O. 70–753*). The Board of Trade have issued notes on export agreements which, under the Act, have to be notified to the Board and not to the Registrar (H.M.S.O. 51–9999).

The Board of Trade has made the Registration of Restrictive Trading Agreements Order, 1956, which came into operation on November 30, 1956, and made certain restrictive trading agreements subject to registration (S.I. 1956 No. 1869). This Order was approved by the House of Commons on November 19, 1956, after debate (560 H.C. Deb. 1452–1464) and by the House of Lords on November 27, 1956, after debate (200 H.L. Deb. 551–559).

NATIONAL HEALTH SERVICE

Charges

A number of regulations (*e.g.*, S.I. 1956 Nos. 1743, 1744, 1745) came into operation on December 1, 1956, the effect of which was to provide that, in place of a single charge of one shilling for each prescription or quantity of drugs or appliances supplied on one occasion, the charge of one shilling should be payable in respect of each item or drug or appliance. A motion to annul these and other regulations was defeated (561 H.C. Deb. 663–728, November 29, 1956).

Regional Hospital Boards

Functions. Regulations have been made raising from £10,000 to £30,000 the limit on a building or civil engineering scheme to be undertaken by a Hospital Board or Board of Governors in England (S.I. 1956 No. 1793) or Scotland (S.I. 1956 No. 1809) without Ministerial consent.

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (pp. 75–76, below).

NATIONAL INSURANCE

Benefits

Death grant. The Report of the National Insurance Advisory Committee on the Death Grant Question has been published (Cmnd. 33).

Germany. Reciprocal agreements have been made between the U.K. and the Federal German Republic covering unemployment, national insurance and industrial injuries. The agreements do not come into effect until ratified.

Malta. See p. 81, below.

Statutory increases. The Ministry of Housing and Local Government has issued a circular on the Pensions (Increase) Act, 1956, because of difficulties experienced by local authorities. The circular deals with incapacity pensions, war bonus, and persons with two or more pensions (Circular No. 54/56). The Act has been extended to cover additional staffs of local authorities (S.I. 1956 No. 2046).

War pensioners. The Minister of Pensions and National Insurance stated that from the beginning of February, 1957, seriously disabled war pensioners aged sixty-five or over were to get a special allowance of between 5s. and 15s. a week; comforts allowances for the most seriously disabled pensioners of all ages were to be increased from 10s. to 20s. a week while certain others would get a comforts allowance of 10s. a week (560 H.C. Deb. 1383–1388, November 19, 1956).

Contributions

Report. The National Insurance Advisory Committee examined the preliminary drafts of N. I. (Contributions) Amendment Regulations, 1956 (S.I. 1956 No. 2020), and N. I. (Residence and Persons Abroad) Amendment Regulations, 1956 (S.I. 1956 No. 2021), and recommended no amendments. The Regulations were therefore laid before Parliament as submitted to the Committee (H.C. 29 of 1956–1957).

Decisions of the Commissioner and the Tribunal

Appeal pending—death of appellant. A claimant appealed to the Commissioner but died before the appeal was heard. No one was willing to be appointed to represent the claimant. *Held*, that the appeal abated and could be disposed of only if some person was duly empowered to proceed with it or it was dismissed at the instance of some person entitled to apply for its dismissal. The insurance officer had so applied: Decision No. R(S) 7/56.

Day of unemployment. Under the National Insurance (Unemployment and Sickness Benefit) Regulations, 1948 (S.I. 1948 No. 1277, as amended by S.I. 1949 No. 1983), reg. 6 (1), "for the purposes of unemployment . . . benefit (*a*) a day shall not be treated as a day of interruption of employment if it is a day in respect of which a person fails to prove . . . that he is unemployed." Reg. 5, where it applies, enables a workman whose night employment extends into two calendar days to qualify for unemployment benefit in respect of one or other of these two days.

A deckhand on a trawler was continuously employed from 6 p.m. on Monday to 2 a.m. on Wednesday. He did not contend that he was unemployed on Tuesday or Wednesday, but claimed benefit for the Monday. *Held,* that he was not unemployed on the Monday. The regulation concerning night workers did not assist him because it applies only to employment beginning before midnight on one day and ending some time during the next day. It does not apply to employment which lasts for more than twenty-four hours on either side of midnight: Decision No. R(U) 18/56.

The Regulations of 1948 (above) (as amended by S.I. 1955 No. 143), reg. 6 (1) (*h*), provide that a day may be treated as a day of unemployment notwithstanding that the claimant follows a subsidiary occupation on that day if (1) the claimant does not earn more than 6s. 8d. a day from that occupation; (2) the claimant is nevertheless available on that day for full-time employment in some employed contributor's employment; and (3) the subsidiary occupation is "consistent with and different in nature from that full-time employment."

Claimant held himself available for full-time employment as a gardener-handyman or, alternatively, as a handyman. His previous full-time employment had been that of gardener. He still had two subsidiary occupations which he had followed outside the normal hours of his full-time employment, *viz.*: as a handyman for a club and as a handyman at an hotel. *Held,* that his duties at the club and hotel were consistent with and different in nature from the full-time employment for which he was available: Decision No. R(U) 15/56.

Claimant held herself available for full-time employment as a waitress. She had occasional evening work at an hotel, which involved not only waiting but taking her turn in washing dishes and attendance in the cloakroom. *Held,* that her subsidiary occupation was different in nature from the full-time employment for which she was available. "Different in nature" discussed: Decision No. R(U) 16/56.

And see below under *Guaranteed week.*

Detention in legal custody. Under the National Insurance Act, 1946, s. 29, a person is disqualified for receiving any benefit for any period during which he is undergoing penal servitude, imprisonment or detention in legal custody.

Whilst serving a prison sentence, the claimant was transferred as a Broadmoor patient to a mental hospital under section 2 (1) of the Criminal Lunatics Act, 1884. When his sentence was about to end, an order was made under section 7 of that Act. The order took effect upon the ending of the prison sentence (upon which the claimant ceased to be a Broadmoor patient) and under the order his detention in the same hospital continued. He claimed sickness benefit for a period during which he was detained under that order. *Held,* that the claimant was disqualified for receiving sickness benefit. While detained under the order made under section 7, he continued to be detained in legal custody within the meaning of section 29 (1) (*b*) of the National Insurance Act, 1946. Decision R(S) 5/55 followed. Decision R(S) 3/55 distinguished: Decision No. R(S) 9/56.

The claimant, while subject to an order for his detention in an institution for defectives, was properly absent from that institution, having been allowed out on licence. While detained in the institution before being allowed out on licence, he was "undergoing detention in legal custody" within the meaning of section 29 (1) of the National Insurance Act, 1946. Successive licences authorised his residence at a hostel with his parents, with his wife and (when he became ill) in a hospital under the personal care and control of the matron. He claimed sickness benefit for a period throughout which, in accordance with the terms of the relevant licence, he was in the hospital. *Held*, (1) When residing under licence with his wife, the claimant was not undergoing detention in legal custody within the meaning of section 29 (1) of the National Insurance Act, 1946.

(2) His transfer to the hospital did not revive his detention in legal custody: Decision No. R(S) 10/56.

Guaranteed week. Under the Act of 1946, s. 11 (1), one of the conditions of entitlement to unemployment benefit in respect of any day is that the claimant proves that it is a day of unemployment.

The terms of a guarantee agreement in the engineering industry which had previously been held by the Commissioner to guarantee wages to employees for the whole of each week were altered with a view to securing title to unemployment benefit in respect of certain days in the week on which the employees, during a period of short-time working, did no work. It was agreed between the parties that the alteration was made solely to achieve this purpose and that the alteration should have no effect "industrially" or in the "application" of the original agreement. *Held*, that the agreement in its original form was still operative. Where a claimant's employment is subject to a guarantee agreement, the ultimate question is what does the employee undertake in consideration of the employer's guarantee. In the present case, the employee was guaranteed wages equivalent to his inclusive hourly plain time rate for thirty-four hours in any pay week, and was required to be at the employer's disposal for thirty-four hours, which could be spread over the entire week. Accordingly, the employee was not unemployed on any day of the week: Decision No. R(U) 21/56 (with Decision C(U) 12/56 in Appendix).

Guidance given concerning an employee who is covered by a guarantee agreement applicable to four days a week and who in fact is given employment on four days in one week and on only three of those four days in the next week, and so on in alternate weeks. In the three-day weeks the fourth day of employment, by virtue of the guarantee, is the other day on which employment is given in the four-day weeks: Decision No. R(U) 22/56.

Increase of benefit—gainful employment. Under the Act of 1946, s. 24 (1), the weekly rate of sickness benefit is increased for any period during which the beneficiary is residing with or is wholly or mainly maintaining his wife who is not engaged in any gainful occupation from which her weekly earnings exceed twenty (now forty) shillings.

The licensee of an inn claimed an increase of sickness benefit in respect of his wife. During his illness she looked after the bar without assistance until 8 p.m. when a barman/cellarman, engaged because of the claimant's illness, arrived. 90 per cent. of the business occurred after 8 p.m. *Held*, that the claimant's wife took a very subordinate part in the conduct of the business and was not gainfully occupied. Decisions C.S. 133/49 and C.S. 509/50 compared: Decision No. R(S) 8/56.

Late claim. Under the N. I. (Claims and Payments) Regulations (S.I. 1948 No. 1041), reg. 11 (1), a person who fails to make a claim for unemployment benefit within the prescribed time is disqualified unless he can show good cause for delay.

A builder's labourer who had been paid off as redundant on a Friday did not claim benefit on Saturday as he was attending a meeting at the request of his union in the hope of obtaining reinstatement. *Held*, that he had good cause for delaying his claim in that he was following up a genuine prospect of employment: Decision No. R(U) 20/56.

Misconduct causing loss of employment. Under the Act of 1946, s. 13 (2) (*a*), a person is disqualified for receiving unemployment benefit for a period not exceeding six weeks if he has lost his employment through his misconduct. *Held*, that the disqualification imposed must be for an *unbroken* period and not for two separated periods: Decision No. R(U) 24/56.

A chartered accountant was dismissed when his employer learned of a conviction for fraud. The offence was committed before the claimant commenced working for that employer. *Held*, that the claimant was not disqualified for receiving unemployment benefit. To be relevant, the alleged act of misconduct must have been committed during the period that the employment was being followed, though not necessarily connected with that employment: Decision No. R(U) 26/56.

Public funds. Under the Act of 1946, s. 21 (1) (*c*) (iii), and S.I. 1948 No. 1261, reg. 4 (1) (*d*), a woman, claiming retirement pension by virtue of her husband's insurance and being over the age of sixty at the date of her marriage, must prove that, immediately before the date of her marriage, she was entitled, otherwise than under the Act of 1946, to a pension or allowance payable out of public funds and ceased to be so entitled by reason only of her marriage.

A widow aged seventy when she remarried, forfeited her Railway Provident Society widow's pension. She claimed retirement pension on the insurance of her husband who was himself receiving retirement pension. *Held*, that she was not entitled to a retirement pension on her husband's insurance as the pension which she had lost had been paid out of a fund not controlled by the Government and was thus not " payable out of public funds ": Decision No. R(P) 13/56.

Repayment—good faith. Under S.I. 1948 No. 1144, where benefit has been overpaid it must be repaid unless the person concerned is shown to the satisfaction of the determining authority to have acted in good faith in all respects as to the obtaining and receipt of the benefit.

A pensioner failed to declare his earnings which consisted of cash and a free house. The local tribunal found lack of good faith in respect of the cash earnings but not in respect of the house and required repayment only of that part of the overpayment based on the cash earnings. *Held*, that he had not shown good faith " in all respects " and that the whole of the overpayment was recoverable. An overpayment cannot be split into an " innocent " element and a " guilty " element: Decision No. R(P) 12/56.

Seasonal worker. A number of the Commissioner's decisions have pointed out that the statutory definition of a seasonal worker embraces two categories of persons, *viz.*: (1) the insured person who normally restricts his employment to the same, or substantially the same, part or parts of the year; and (2) the insured person whose normal employment is for a part or parts only of a year in an occupation or occupations of which the availability or extent varies at approximately the same time or times in successive years.

At about the same time in each of the preceding three years, a share-fisherman had a spell of over seven weeks non-employment, due to the laying-up of the boat for repairs or overhaul. He stated that as an enrolled member of the R.N.V.R. he was precluded from working ashore under the age of twenty-six. *Held*, that the claimant could not escape classification as a seasonal worker merely because his recurrent non-employment was for a very necessary reason: Decision No. R(U) 28/56.

Trade dispute. Under the Act of 1946, s. 13 (1), a person is disqualified for receiving unemployment benefit if he has lost employment by reason of a stoppage of work which was due to a trade dispute at his place of employment. This does not apply in the case of a person who proves (a) that he is not participating in or financing or directly interested in the trade dispute; and (b) that he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at his place of employment any of whom are participating in or financing or directly interested in the dispute.

A coppersmith's labourer withdrew his labour in sympathy with strikers in a trade dispute which primarily concerned the coppersmiths. The claimant, having already been declared redundant, would have been unemployed in any event on the third day of the stoppage. The members of his grade resumed work before the general stoppage ended. *Held*, that the claimant was disqualified from receiving unemployment benefit until the end of the general stoppage: Decision No. R(U) 17/56.

A trawler skipper was discharged at the end of a fishing trip; the owners intended to re-engage him a fortnight later but a general stoppage of work due to a trade dispute intervened and prevented this. *Held*, that the claimant had not been " finally discharged " in accepted sense before the stoppage began and he lost employment by reason of the stoppage. Disqualification upheld: Decision No. R(U) 19/56.

A machinist's mate had lost employment as a result of a stoppage of work due to a trade dispute, in which mates to other tradesmen were participating. *Held*, that the claimant was disqualified for receiving unemployment benefit on the ground that he was of the same grade or class as the other mates, inasmuch as all were semi-skilled and paid at the same rate: Decision No. R(U) 23/56.

A colliery surface worker lost employment as a result of a stoppage of work due to a trade dispute concerning the withholding of bonus from an underground worker in another grade who absented himself without leave. *Held*, that he was directly interested in the dispute. The conditions governing the payment of bonus were a matter of direct concern to all affected by the existing agreement governing such payment: Decision No. R(U) 25/56.

A turner and his workmates withdrew their labour when, after their union had approached their employer to discuss wages, the employer announced a reduction in wages. They were dismissed four days later, but work was resumed by agreement after a further ten days pending negotiations. *Held*, that the claimant was disqualified for receiving unemployment benefit by reason of a stoppage of work due to a trade dispute. The dismissal was merely a step in the trade dispute and not a severance of relations between the parties: Decision No. R(U) 27/56.

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Benefits

See **Malta,** p. 81, below.

Decisions of the Commissioner and the Tribunal

Accident. Under the National Insurance (Industrial Injuries) Act, 1946, s. 7, a claimant must show, *inter alia*, that personal injury was caused by accident arising out of and in the course of his employment.

A miner suffered an industrial accident on February 1, 1955. At first he reported an injury to his shoulder and was certified incapable of work from this cause. Later it was claimed that he had also injured his head. About three weeks after the accident he became confused and gradually lost the use of his limbs and speech. He died on August 13, 1955. *Held*, that death did not result from the injury. The post mortem examination showed that the immediate cause of death was pulmonary embolus associated with heart failure but that the deceased had also suffered from a cerebral thrombosis. This was not the result of the accident as the head injury could not have been severe and the thrombosis had not occurred within a day or two of the accident: Decision No. R(I) 21/56.

Coronary disease. A miner, who had been suffering from pains in his chest during the previous twelve months, collapsed and died at the coal face. The cause of death was coronary thrombosis. *Held*, that the medical evidence showed that the thrombus started to form two days before death, which was sudden and was due to the complete blocking of the main right coronary artery. It was held that the work done on the day the thrombus started to form, being the deceased's normal and usual work, played no part in causing its formation. Further it was held that blocking of the whole of one coronary artery was incompatible with life so that the work done after the thrombus had started to form was unlikely to have appreciably accelerated death: Decision No. R(I) 29/56.

Disablement benefit. Claimant was awarded disablement benefit in June, 1952, on an assessment of 10 per cent. for life, together with special hardship allowance. He elected to receive a pension in lieu of a gratuity. In April, 1954, he became entitled in respect of another accident to a further award of disablement benefit, on an assessment of 10 per cent. for life, and payment was again made by way of pension. In December, 1955, the award of special hardship allowance was terminated and payment of the balances of both gratuities therefore became due. *Held*, that, in respect of each accident, the amount of the balance to be paid was the amount of gratuity originally awarded less the total amount actually paid by way of pension: Decision No. R(I) 30/56.

Out of and in the course of employment. For the statutory provision (s. 7) see *Accident* (above).

A miner aged sixty-two finished a night shift, took a bath and went to the canteen, as was his habit, to avoid the rush for the first buses before he set out to catch a later bus. On the way to the bus stop he slipped on a road, which was part of the colliery premises and sustained injuries. *Held*, that there was an industrial accident. In view of the claimant's age, the delay before he started to leave the premises was reasonable, and did not put an end to the course of his employment. Decisions R(I) 52/52 and C.I. 120/49 (reported) distinguished: Decision No. R(I) 22/56.

An insurance broker's agent died from wounding by stabbing, inflicted by a man to whom he had given a lift in his car so that he could be shown where to obtain a meal. The assailant pleaded guilty to the murder and was executed. *Held*, that it had not been proved that the death by accident arose out of the deceased's employment. He had become the victim solely because he was a stranger to the assailant, a risk he shared with all persons with whom the latter was not acquainted. Decision R(I) 41/54 compared: Decision No. R(I) 23/56.

An apprentice electrician, who had left the colliery premises to obtain chips from a fish and chip shop for himself and the men with whom he worked, was injured crossing an arterial road while returning to work. *Held*, that the accident was not an industrial accident, on the ground that the purchasing of food outside the premises was not incidental to the claimant's employment: Decision No. R(I) 24/56.

A blacksmith on the maintenance staff of a chemical works was asked to report for duty on a Sunday afternoon as the plant has broken down. Attendance was voluntary, but payments at overtime rates were made. The claimant was proceeding to the works, when he fell. *Held*, that the accident arose out of and in the course of employment. The claimant had agreed to report and was proceeding by the shortest practicable route to the works. Decision R(I) 21/51 compared: Decision No. R(I) 27/56.

Pneumoconiosis. A miner who for over two years had been in receipt of 20 per cent. disablement pension for pneumoconiosis, was certified as having died from "Cancer of the lung. Pneumoconiosis." *Held*, on the medical evidence, that death did not result from pneumoconiosis. Although the pneumoconiosis present prevented operative treatment for carcinoma of the lung, the extent of the carcinoma precluded any prospect of a successful operation: Decision No. 26/56.

Prescribed disease. Under the N. I. (I. I.) (Prescribed Diseases) Regulations, 1948 (S.I. 1948 No. 1371, as amended by S.I. 1951 No. 305), tuberculosis is a prescribed disease for persons in certain occupations. The occupation relevant to this case is one " involving close and frequent contact with a source or sources of tuberculous infection by reason of employment (*a*) in the medical treatment or nursing of a person or persons suffering from tuberculosis."

A nurse in a children's hospital contracted tuberculosis. The children with whom she was in contact, although possibly suffering from primary tuberculosis, were not " open " cases and could not be considered as sources of infection. *Held,* that tuberculosis was not prescribed in relation to the claimant. Her occupation had not involved close and frequent contact with sources of tuberculosis infection. Decision R(I) 31/54 compared; Decisions R(I) 65/52 and 70/52 distinguished: Decision No. R(I) 28/56.

NATIONALISED INDUSTRIES

General

Accountability. The motion to appoint a Select Committee of the House of Commons with the terms of reference announced on May 10, 1956 (552 H.C. Deb. 1423–1424; see [1956] P.L. 270) was approved on November 29, 1956 (561 H.C. Deb. 592–662).

Appointment. The list has been published of members of public boards of a commercial character as at November 1, 1956, with salaries and allowances, together with a list of those holding more than one appointment (Cmnd. 43).

Members' salaries. The Minister of Fuel and Power stated that the Government recognised that there was much to be said for a review of the salaries paid to members of the boards of nationalised industries but regretted that the financial and economic situation made it impossible for him to make any more definite statement at present (562 H.C. Deb. *4*, December 10, 1956; see [1956] P.L. 163, under **Electricity,** *Committee's Report*).

Airways

Borrowing. The Air Corporations Act, 1956 (5 Eliz. 2, c. 3), received the Royal Assent on December 20, 1956. The Act increases the amount outstanding at any time of money borrowed by the corporations from £80m. to £160m. (for B.O.A.C.) and from £35m. to £60m. (for B.E.A.C.). The Act also empowers B.O.A.C. to borrow from the International Bank for Reconstruction and Development or the Export-Import Bank of Washington, any sums required for buying aircraft manufactured in the U.S.A. or spare parts or equipment for such aircraft. The Act amends the Air Corporations Act, 1949, s. 12, and repeals the Air Corporations Act, 1953, s. 1. For Second Reading debate in the House of Commons, see 560 H.C. Deb. 1389–1440, November 19, 1956.

Debates. On November 2, 1956, the House of Commons debated a motion to take note of the annual reports and accounts for 1955–1956 of the B.O.A.C. and B.E.A.C. (558 H.C. Deb. 1776–1851). On December 13, 1956, the House of Lords debated Civil Aviation (200 H.L. Deb. 1129–1175).

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by B.E.A.C. (H.C. 411 of 1955–1956) and B.O.A.C. (H.C. 412 of 1955–1956).

Electricity

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by the Central Electricity Authority (H.C. 413 of 1955–1956), the North of Scotland Hydro-Electric Board (H.C. 415 of 1955–1956) and the South of Scotland Electricity Board (H.C. 416 of 1955–1956 and H.C. 19 of 1956–1957).

Powers. The South of Scotland Electricity Order Confirmation Act, 1956 (4 & 5 Eliz. 2, c. xciv) received the Royal Assent on November 5, 1956. The provisional order confirmed by the Act is to consolidate local enactments with amendments, to secure a uniform statutory code, to confer further powers on the South of Scotland Electricity Board and for other purposes.

Reorganisation. The Government has announced its proposals for the reorganisation of the electricity supply industry, based on the report of the Herbert Committee (see [1956] P.L. 162–163). The Government proposes to dissolve the Central Electricity Authority on April 1, 1958, and to set up an Electricity Council to advise the Minister, to promote and assist the maintenance and development by a new Generating Board and by the Area Boards of the supply of electricity. Greater autonomy will be given to the Area Boards, each of which will be required to balance its accounts (Cmnd. 27). The Second Reading of the consequent Electricity Bill took place in the House of Commons on December 17, 1956 (562 H.C. Deb. 942–1061).

Gas

Charges. To draw attention to the effect on old-age pensioners and others of a decision of the Northern Gas Board to impose a minimum charge, Dame Irene Ward, M.P., moved for leave to bring in a Bill to amend the Gas Act, 1948, s. 53 (7) (558 H.C. Deb. 647–652, October 24, 1956).

Guarantee. The Treasury issued a statement of guarantee on a loan proposed to be raised by the Gas Council (H.C. 414 of 1955–1956).

Reports. The twelve Area Boards have published their reports and accounts, including the reports of their consultative councils for 1955–1956 (H.C. 381–392 of 1955–1956). The Gas Council has published its 7th report and statement of accounts for 1955–1956 (H.C. 393 of 1955–1956) and the Minister of Fuel and Power has made his related report (H.C. 394 of 1955–1956).

Transport

Account of the Transport Fund (set up under the Transport Act, 1953, s. 13 (1)) for 1955 together with the Report of the Comptroller and Auditor-General thereon has been published (H.C. 360 of 1955–1956).

Debate. On December 3, 1956, the House of Commons gave a Second Reading to the Transport (Railway Finances) Bill (561 H.C. Deb. 899–1004).

Guarantees. The Treasury issued statements of guarantee on stock issued and loans proposed to be raised by the British Transport Commission (H.C. 417, 418 of 1955–1956).

Powers. The British Transport Commission Act, 1956 (4 & 5 Eliz. 2, c. lxxiv), received the Royal Assent on August 2, 1956. It empowers the Commission to construct works, and to acquire lands, to make provision with respect to the River Kennet Navigation and the Kennet and Avon Canal, to authorise the closing for navigation of certain inland waterways and the supply of water from the Lancaster Canal, to transfer a light railway to the Admiralty, to extend the time for the compulsory purchase of certain lands and the completion of certain works, and to confer further powers on the Commission.

Proposals. The Government has issued a White Paper containing its proposals for the future of the railways and a memorandum submitted to the Minister of Transport and Civil Aviation by the British Transport Commission, being a review of policy and prospects with special reference to the railways.

This review states that the Commission are tackling the problem of achieving a profitable basis for the operation of the railways under four principal headings (a) Modernisation; (b) Elimination of services for which there is no longer public need or which can be more efficiently performed by other means of transport, and development of the remaining services; (c) Increased productivity; (d) Relaxation of statutory and other obligations, particularly the introduction of greater freedom in fixing fares and charging policy. The Commission estimate that, provided these measures are given a proper chance to fructify, the annual net revenue of the Commission will be in balance by 1961 or 1962 and that by 1970 there should be a surplus of £50m. a year. "In this situation the Commission urgently recommend that some financial plan should be adopted which, while it avoids subsidy, will place their organisation on a firm, sound basis during these critical years of reconstruction."

In its statement, the Government accepts the Commission's plans as practical and necessary. The Government therefore proposes that for a specified number of years, broadly until the revenue account of the Commission is expected to be in balance, special advances should be made to the Commission out of the Consolidated Fund equivalent to their revenue deficits in these years but limited as to total amount which may be of the order of £250m. These advances would be repayable by instalments beginning after a specified period; they would be liable to interest but for a certain time the Commission would be entitled to receive special additional advances to cover payments of that interest. The Commission should also be empowered to borrow to cover the first three years' interest on sums required for capital expenditure (Cmd. 9880).

For a debate in the House of Lords, see 200 H.L. Deb. 559–616, November 27, 1956.

For the consequent Bill and debate in the House of Commons, see *Debate*, above.

Report. The Seventh and Final Report of the Road Haulage Disposal Board has been published (H.C. 410 of 1955–1956).

PARLIAMENT

Broadcasting

Anticipation of debates. The Prime Minister stated that the Government had decided to suspend the "14-day rule" for an experimental period of six months. He stated that assurances had been received from the B.B.C., the I.T.A. and the programme companies that they would continue to act in a way which did not derogate from the primacy of Parliament as the forum for debating the affairs of the nation (562 H.C. Deb. 1099–1101, December 18, 1956; and see [1956] P.L. 273–274). For a breach of the 14-day rule, see 200 H.L. Deb. 229–230, November 13, 1956.

Privilege

Molestation by telephone. A Member's complaint that continuous telephone calls by anonymous callers using objectionable, threatening and intimidatory language had been and were being made to his private house was referred to the Committee of Privileges (561 H.C. Deb. 239–243, November 27, 1956). The Committee of Privileges reported that the molestation was caused by an article in the *Sunday Graphic* which exhorted its readers to telephone the Member (Mr. Arthur Lewis) at his private house and complain about a Question which the Member had put down; that the Editor was responsible and had been guilty of breach of privilege; that the breach was serious but that as molestation had not before taken a similar form, as the Editor had humbly apologised to the Speaker of the House of Commons and the Member and as the breach was unlikely to be repeated, no further action by the House was necessary (H.C. 27 of 1956–1957).

Newspaper article. An article in the *Sunday Express* of December 16, 1956, concerning petrol rationing which the Member reporting it described as " not only untrue but . . . a disgraceful libel against the High Court of Parliament " was referred to the Committee of Privileges (562 H.C. Deb. 938–941, December 17, 1956). A cartoon in the *Evening News* of December 18, 1956, on the same subject was also referred to the Committee (562 H.C. Deb. 1106–1108, December 18, 1956).

Procedure

Committee. The First Report from the Select Committee of the House of Lords on Procedure of the House has been published. Recommendations are made on procedure on report stage of Bills, the constitution of the Committee on Privileges, the interval between Questions on a Division and Quorum on Divisions (H.L. (16) of 1956–1957).

Observance of Rules. A debate took place in the House of Lords on the failure to observe the Rules of the House (200 H.L. Deb. 311–326, November 14, 1956).

Public Bills

Return has been published for the Session 1955–1956 of the number of Public Bills distinguishing Government from other Bills and showing the number which received the Royal Assent and the number which did not, indicating the stage reached by the latter (H.C. 428 of 1955–1956).

Publications and debates reports

Committee. The Report from the Select Committee of the House of Commons on publications and debates reports has been published, together with the proceedings and minutes of evidence. The Committee were informed that there were no machines of British manufacture which could print the Votes and Proceedings in their present form unless the length of page were shortened by one inch; but that several Continental machines exist of which the most satisfactory were German. The Committee recommended to Mr. Speaker (who accepted it) that the British machine should be used (H.C. 420 of 1955–1956; 558 H.C. Deb. 947).

Queen's Speech

Prorogation. The Queen's speech at the end of the First Session of the Forty-first Parliament is reported in 558 H.C. Deb. 1984–1988 and 199 H.L. Deb. 1380–1384, November 5, 1956.

Opening. The Queen's speech at the opening of the Second Session of the Forty-first Parliament is reported in 559 H.C. Deb. 16–19 and 200 H.L. Deb. 1–4, November 6, 1956.

Standing Committees

Return has been published for the Session 1955–1956 of the number and names of Members of the House of Commons, their attendance and other statistics relating to Standing Committees (H.C. 429 of 1955–1956).

Ways and Means

Deputy-chairman. On the death of Sir Rhys Hopkin Morris, the House of Commons appointed Sir Gordon Touche to be Deputy-chairman of Ways and Means (561 H.C. Deb. 234–236, November 27, 1956).

See also SUBORDINATE LEGISLATION (pp. 74–75, below).

PRACTICE

Crown practice

Privilege. The House of Commons debated Crown privilege for documents and oral evidence on October 26, 1956 (558 H.C. Deb. 948–1040) and, on the Adjournment, on December 20, 1956 (562 H.C. Deb. 1600–1610).

PUBLIC AUTHORITIES

Agricultural Land Commission

Report. The 9th Report for 1955–1956 has been published (H.C. 408 of 1955–1956).

Crown Estate Commissioners

Crown Estate Act, 1956 (4 & 5 Eliz. 2, c. 73) received the Royal Assent on November 5, 1956. The Act reconstitutes the Commissioners of Crown Lands under the above name. The Commissioners are to be appointed by H.M., to number not more than eight, the chairman being the First Crown Estate Commissioner. The previous *ex officio* appointment of the Minister of Agriculture, Fisheries and Food and the Secretary of State for Scotland as Commissioners ceases. The appointed day for the operation of the Act is December 14, 1956 (S.I. 1956 No. 1890).

Forestry Commission

Report. The 36th Report for 1954–1955 has been published (H.C. 341 of 1955–1956).

General Medical Council

Constitution. The Medical Act, 1956 (4 & 5 Eliz. 2, c. 76) received the Royal Assent on November 5, 1956. The Act is largely consolidatory. Part I and the First and Second Schedules deal with the General Medical Council and the Branch Councils.

Lunacy and Mental Treatment—Board of Control

Report for 1955 has been published (H.C. 325 of 1955–1956).

National Parks Commission

Report. The 7th Report for 1955–1956 has been published (H.C. 8 of 1956–1957).

Sugar Board

Appointed day. The sections of the Sugar Act, 1956, not already in operation come into force on January 1, 1957, except sections 18 (7) (8), 20 (6) and Sched. 4, 32 (2) (in part) which come into force on March 31, 1957. The Sugar Board, appointed under section 1, perform their functions from January 1, 1957.

University Grants Committee

Report of the sub-committee (Chairman: Sir George Gater) to examine the methods used by Universities of contracting and recording and controlling expenditure has been published (Cmnd. 9).

White Fish Authority

Report. The 5th Annual Report and Accounts for 1955–1956 has been published (H.C. 342 of 1955–1956).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (pp. 59–60, above), WIRELESS AND TELEVISION (pp. 76–77, below).

PUBLIC HEALTH

Regulation

Air pollution. In England and Wales the appointed day for the coming into operation and for all other purposes of the Clean Air Act, 1956, except sections 1, 2, 5–9, 16, 19, 20, 22 (1) (*a*) (*c*) (*d*) (3), 35 (1) (in part) (2), Sched. 4 (in part) was December 31, 1956 (S.I. 1956 No. 2022; see [1956] P.L. 372, 394; for Scotland, see S.I. 1956 No. 2026).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (pp. 59–60, above).

SCOTLAND

See COURTS (p. 58, above), EDUCATION (p. 58, above), LOCAL GOVERNMENT (pp. 60–62, above), NATIONALISED INDUSTRIES (pp. 69–71, above), PUBLIC AUTHORITIES (p. 73, above), SUBORDINATE LEGISLATION (pp. 74–75, below), TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (pp. 75–76, below).

SUBORDINATE LEGISLATION

Emergency Laws

Continuance in force. The Houses of Parliament, after debate, resolved to continue in force the Supplies and Services (Transitional Powers) Act, 1945 and certain Defence Regulations for a further period of one year (560 H.C. Deb. 1567–1614, November 20, 1956; 200 H.L. 374–389, November 20, 1956). An explanatory memorandum on the continuance of emergency legislation has been published (Cmnd. 7).

Parliamentary proceedings

Procedure. Under sessional rules of the House of Commons, at 11.30 p.m. on a debate on a Prayer, the Speaker must either put the Question forthwith or, if he thinks it has not been adequately discussed, adjourn the debate to the following day. The Solicitors' Remuneration Order, 1956, was made on October 19, laid before Parliament on October 26 and was to come into operation on December 1, 1956. On November 26, the Order was prayed against, the prayer being moved at 11.7 p.m. This was the last praying day. The Speaker ruled that he must put the Question that night at 11.30 p.m. since to adjourn the debate would be to put an end to the prayer. The prayer succeeded and on November 29, 1956, the Solicitors' Remuneration (Disallowance) Order, 1956 (S.I. 1956 No. 1898) was made (561 H.C. Deb. 187–196, November 26, 1956).

Select Committee on Statutory Instruments (*House of Commons*). On October 25, 1956, the Committee considered eighty-eight instruments and resolved that it was unnecessary to draw the attention of the House to them. The Committee asked for memoranda from Government Departments in respect of four instruments (H.C. 16–XX of 1955–1956).

On November 15, 1956, the Committee examined forty-one instruments and resolved that it was unnecessary to draw the attention of the House to them. The Committee asked for memoranda from Government Departments in respect of two instruments (H.C. 4 of 1956–1957).

On November 27, 1956, the Committee examined eighteen instruments and resolved that it was unnecessary to draw the attention of the House to them. The Committee asked for memoranda from Government Departments in respect of two instruments. The Committee drew the special attention of the House to the Teachers' Salaries (Scotland) Regulations, 1956, on the ground that they appeared to make unexpected use of the powers conferred (H.C. 4–II of 1956–1957).

On December 11, 1956, the Committee examined forty-three instruments and resolved that it was unnecessary to draw the attention of the House to them (H.C. 4–III of 1956–1957).

Special Orders Committee (*House of Lords*). In the Fourteenth Report the Committee examined two instruments and reported, in the case of the Housing (Payments for Well-maintained Houses) Order, 1956, (a) that it did not raise important questions of policy or principle; (b) that it was not founded on precedent; and (c) that it could be passed by the House without special attention or further special inquiry. In the case of the Fatstock (Guarantee Payments) (Amendment No. 2) Order, 1956, the Committee reported (a) that it raised important questions of policy and principle; (b) that it was founded on precedent; and (c) that it could not be passed without special attention but that no further special inquiry was necessary (H.L. (185) of 1955–1956). In the First, Second and Third Reports of the new session, the Committee examined twelve instruments. In the case of eight instruments, they reported that (a) they did not raise important questions of policy or principle; (b) were founded on precedent; and (c) could be passed without special attention or further inquiry. In the case of Draft Patents (Extension of Period of Emergency) Order, 1956, Draft Registered Designs (Extension of Period of Emergency) Order, 1956, Registration of Restrictive Trading Agreements Order, 1956, and Draft British Egg Marketing Scheme, 1956, the Committee reported that they (a) raised important questions of policy and principle; (b) were (with one exception) founded on precedent; and (c) could not be passed without special attention but needed no further special inquiry (H.L. (6), (12) and (17) of 1956–1957).

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

Agriculture. The Scottish Land Court has published its annual report for 1955 (Cmnd. 15).

Committee. The Committee on Administrative Tribunals and Enquiries (Chairman: Sir Oliver Franks) has published (1) a sixth volume of the memoranda submitted by Government Departments in reply to a questionnaire; (2) three further volumes of the Minutes of Evidence; for the nineteenth day when evidence was given on behalf of the Urban District Councils Association, the Rural District Councils Association, the British Medical Association, the Association of County Councils in Scotland, the Justice for Landladies Association, and the Society of Civil Servants (Rent Tribunals Branch) and by Mr. Arnold Keen, Mr. J. A. Seabrook and Mr. R. C. Hines; for the twentieth day when evidence was given on behalf of the Scottish Landowners' Federation, the London County Council and the National Farmers' Union and by Sir Leonard Costello, Mr. G. J. K. Little, Mr. W. O. Nightingale, Sir Reginald Sharpe, Mr. R. T. Hanwell, Mr. J. E. Perkins, Mr. F. Broddle, and Mrs. G. M. H. Jeffries; and for the twenty-first day when evidence was given by Mrs. Ruth Glass and Mr. J. A. G. Griffith, and on behalf of the London Executive Council (National Health Service) (the Memoranda and Minutes are published by H.M.S.O.).

Disciplinary bodies

Medical Act, 1956 (4 & 5 Eliz. 2, c. 76) received the Royal Assent on November 5, 1956. The Act is largely consolidatory. Part V deals with erasion and restoration to the register and with the Disciplinary Committee. Part VI deals with the Registrars, the registers and procedure for registration. The Fourth Schedule provides as to proceedings of the Disciplinary Committee.

Lands Tribunal

Procedure. New rules have been made. They consolidate, with minor amendments, the Lands Tribunal Rules, 1949 to 1955.

Part I of the Rules deals with appeals against determinations by Government Departments or other authorities, where the Government Department or authority is itself a party to the appeal. Part II deals with appeals in rating matters from the local valuation courts set up by the Local Government Act, 1948. Part III deals with any appeals to which neither Part I nor Part II applies. Part IV relates to disputes as to compensation for compulsory acquisition of interests in land and as to questions on various other matters set out in Rule 15. Part V deals with applications for the discharge or modification of restrictive covenants under section 84 of the Law of Property Act, 1925. Part VI deals generally with procedure in all proceedings before the Tribunal. It contains a new proviso to Rule 32, enabling a determination given in the absence of a party to be later rescinded, and in Rule 52 the exercise of the Tribunal's powers to inspect premises is made optional. Part VII contains general provisions as to notices, fees, transitional matters, etc. Among the fees prescribed in the Second Schedule, the hearing fee payable on appeals against determinations is no longer confined to determinations by the Central Land Board (S.I. 1956 No. 1734).

Performing Right Tribunal

Copyright Act, 1956 (4 & 5 Eliz. 2, c. 74). Part IV provides for the establishment of a new Performing Right Tribunal, consisting of a chairman (who must be a barrister, advocate or solicitor) appointed by the Lord Chancellor and two to four other members appointed by the Board of Trade (s. 23). The Tribunal will adjudicate in certain disputes about licences for the public performance of literary, dramatic or musical works, for broadcasts of sound recordings and for television broadcasts (s. 24). A " licence scheme " (as defined in s. 24 (4)) may be referred to the Tribunal by representative organisations or by interested individuals (s. 25). Further references of the same scheme to the Tribunal are governed by section 26. Section 27 provides for applications to the Tribunal in cases of failure to obtain licences in accordance with the provisions of a licence scheme or (in cases not covered by such a scheme) where licences are otherwise not obtainable or not obtainable on reasonable terms. Section 28 contains special provisions as to the exercise of the Tribunal's jurisdiction in relation to the diffusion of foreign broadcasts. Section 29 deals with effect of orders made by the Tribunal and contains supplementary provisions. Under section 30 questions of law may be referred by the Tribunal, on the application of any party, to the High Court or (in Scotland) the Court of Session.

Rent Tribunals

Continuance. Under the Expiring Laws Continuance Bill, the existence of rent tribunals will continue to be authorised until March 31, 1958 (560 H.C. Deb. 1701–1710, November 20, 1956).

WALES

Government action

Report. The Report has been published of Government action for the year ended June, 1956, under the following headings: General survey; Industrial, Employment and Development; Agriculture, Forestry and Fisheries; Research; Housing, Planning, Health and other Local Government services; Education; Social services; Public utilities and other services (Cmd. 9887).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (pp. 59–60, above), WIRELESS AND TELEVISION (pp. 76–77, below).

WIRELESS AND TELEVISION

British Broadcasting Corporation

Debate. On the Adjournment the House of Commons on November 14, 1956, debated the News Broadcasts of the B.B.C. (560 H.C. Deb. 1025–1104).

Welsh service. The Report of the Committee of Inquiry into allegations of bias in the Welsh service of the B.B.C. (see [1956] P.L. 175) has been published. The Committee concluded, *inter alia,* that there was no evidence to support the grave charge made in the House of bias through corrupt and deliberate distortion, suppression and selection of news, that there had been some errors of judgment and some lack of balance (not due to deliberate intention) and that " the B.B.C. staff in Wales are fully conscious of their obligations and carry out their task to the best of their ability in an impartial manner " (Cmnd. 39).

Independent Television Authority

Account of sums issued to the Postmaster-General out of the Consolidated Fund under section 12 (2) and of sums received by him and paid into the Exchequer under section 12 (3) during 1955–1956 in respect of advances to the I.T.A., together with the report of the Comptroller and Auditor-General thereon, has been published (H.C. 11 of 1956–1957).

Report and Accounts for 1955–1956 have been published (H.C. 362 of 1955–1956).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Aid to dependent territories. The Basic Agreement between the Government of the U.K. and UNESCO regarding aid to U.K. dependent territories has been published (Cmd. 9873).

Commonwealth development. The House of Commons debated a motion urging the Government to invite the other members of the Commonwealth to join in setting up Commonwealth machinery for the development of natural resources throughout the Commonwealth and in the Colonial territories (561 H.C. Deb. 741–838, November 30, 1956).

Debate. The Secretary of State for the Colonies surveyed colonial affairs in a speech in the debate on the Address (560 H.C. Deb. 756–774, November 13, 1956).

Emergency powers. An Order in Council empowers the Governor of certain territories by order to provide for the continuation in force of certain Defence Regulations. The territories are: Bahamas, Cyprus, Jamaica, Kenya (Colony and Protectorate), Leeward Islands, Trinidad and Tobago (S.I. 1956 No. 1887).

Local government finance in Africa. The Colonial Local Government Advisory Panel has published a memorandum as a special supplement to the *Journal of African Administration,* October, 1956.

Australia

Territorial competence of Australian states—severability of statutes. Professor Sawer has sent the following note: In *Johnson* v. *Commissioner of Stamp Duties* [1956] A.C. 331, the Privy Council (on appeal from the Supreme Court of N.S.W.) has accepted without question the view that the legislative power of the Australian states is effectively limited by the phrase, common in one form or another to the State Constitution Acts, that their laws must be for the " peace, order and good government of the state." The Solicitor-General for N.S.W. argued that it is for the legislature, not the courts, to decide whether a law is for the " peace, order and good government " of a state in this sense; however, he does not seem to have cited *Croft* v. *Dunphy* [1933] A.C. 156, in which the Privy Council went some distance towards accepting that view, and it is not surprising that the Board as at present constituted should have insisted on the " limited sovereignty " of the states and upheld the view, applied in many taxation cases by the High Court of Australia, that the courts and not the legislature are final judges of the sufficiency of the connection between the law and the state in question. In tax cases such as the present, the permitted connection has to be territorial. This can be supplied either by the site of the property concerned, or by the domicile (or perhaps residence) of a natural person (and analogous relations of juristic persons) owning or possessing property wherever situated. By approving the decisions of the High Court of Australia in *Millar's Case* (1932) 48 C.L.R. 618 and *Broken Hill South, Ltd.* v. *Commissioner of Taxation* (1937) 56 C.L.R. 337, and by its own dicta, the Board has now provided a clear set of rules for determining these questions. This is very convenient in the case of a federation like Australia, where it would be a nuisance if states could to an unlimited extent pursue persons and property, for tax and other purposes, into the other units of the federation. But the doctrine is not put on that basis, and its desirability as a general principle concerning relations between courts and parliaments is more disputable.

The Board also considered for the first time some difficulties in the rules concerning severability of statutes under severability clauses, a topic on which the High Court of Australia has constructed an even more elaborate set of doctrines than the Supreme Court of the U.S.A. The Board adopted the classic statement of the operation of such clauses by Dixon J. (now C.J.) in *King* v. *Poole* (*No.* 2) (1939) 61 C.L.R. at 651, and also (without citing Australian cases) agreed with the High Court's view that for " distributive " severability to occur, the statute to be severed must itself indicate " once and for all " the more restricted class of persons or events to which it is intended, validly, to apply when the primary classification turns out to include persons, etc., beyond power; it is not competent for the courts to dispense with such a " once and for all " reclassification, and instead decide from case to case whether on any conceivable view of power *nexus* that particular case could have been validly dealt with by the legislature. (See on this the argument of Phillips, Q.C. in *Pidoto's Case* (1943) 68 C.L.R. at 97, and the comment of Latham C.J., *ibid.*, at 108 *et seq.*) In the Australian discussions, the view now adopted is called the " rule of construction " view of severability clauses, and that rejected the " operational " view. But it should be noted that the Australian States, having no doctrine of separation of powers to plague them (as does the federal parliament) could adopt an " operative " type of severability clause if they wanted to; the federal parliament might not be so able, on the theory that such a clause would, by inviting the courts to adapt legislation to facts as they arose, amount to an unconstitutional vesting of legislative power in judicial bodies.

Bahamas

See **General** (p. 77, above).

Basutoland

Report. The Colonial Report, 1955, has been published by the Colonial Office.

Bechuanaland

Report. The Colonial Report, 1955, for the protectorate has been published by the Colonial Office.

British Guiana

Constitution. The Secretary of State for the Colonies stated that he had decided that the proposed number of seats in the Legislative Council should be increased from not more than twenty-four to not more than twenty-eight;

two more elected members and two more nominated members. The number of *ex officio* members of the Executive Council and the Legislative Council would be reduced from four to three (558 H.C. Deb. 1445, October 31, 1956; for the Order in Council, see S.I. 1956 No. 2030).

Report. The Colonial Report, 1955, has been published by the Colonial Office.

Cameroons

Report by H.M.'s Government in the U.K. to the General Assembly of the United Nations has been published by the Colonial Office.

Cyprus

Constitutional proposals. The Report submitted to the Secretary of State for the Colonies by Lord Radcliffe has been published (for his terms of reference, see [1956] P.L. 402). The Report proposed, *inter alia,* (1) that there should be a Governor with prescribed powers and duties, appointed by H.M.'s Commission; (2) that there should be a Legislative Assembly and a Cabinet responsible to it, with prescribed powers and duties; (3) that external affairs, defence and internal security should be " Governor's matters "; (4) that, subject to (3), the general power to make laws should be exercised by the Legislative Assembly—these are called " self-governing matters "; (5) that the Governor should have power, in certain cases, to withhold his assent to Bills passed by the Legislative Assembly; (6) that, subject to certain restrictions, the administration of government and the executive power in respect of self-governing matters should be exercised by the Governor through Ministers chosen from the Legislative Assembly and he would normally act on their advice; (7) that, for self-governing matters, certain specified restrictions and guarantees should be fundamental relating to religion, institutions and schools, language, non-discrimination, expropriation, access to the courts, and Turkish Cypriot affairs; (8) that the Legislative Assembly should consist of a Speaker, a Deputy-Speaker and thirty-six other members of whom six would be elected by voters on a Turkish Cypriot communal roll, twenty-four by voters on a general roll and six nominated by the Governor; (9) that there should be a Chief Minister to act as Head of the Government in self-governing matters, appointed by the Governor, as being the person who appears to him to command the largest measure of general support in the Legislative Assembly; (10) that the Governor would appoint Ministers, being members of the Legislative Assembly, on the recommendation of the Chief Minister; (11) that the Governor should have power to make Ordinances on Governor's matters; (12) that there should be a Joint Council to consider and discuss matters of common concern to the retained and the self-governing side of Government, consisting of the Governor, the Chief Minister and others; (13) that there should be a Supreme Court and a Judicial Service Commission; (14) that there should be a Tribunal of Guarantees to investigate any complaints of discrimination or other violations of fundamental rights guaranteed by the Constitution. Other recommendations relate to broadcasting, inter-communal education, public service and the public service commission, the auditor-general and attorney-general, the Governor's powers of pardon, finance, and emergency laws (Cmnd. 42).

The Secretary of State for the Colonies stated that H.M.'s Government accepted these proposals and would be prepared to introduce such a Constitution as soon as they were satisfied that a situation existed in Cyprus in which genuine elections could be held free from violence and intimidation; when the international and strategic situation permitted and provided that self-government was working satisfactorily, H.M.'s Government would be ready to review the question of the application of self-determination; H.M.'s Government recognised that the exercise of self-determination in such a mixed population must include partition among the eventual options (562 H.C. Deb.

1271–1283, December 19, 1956; see also 200 H.L. Deb. 1255–1261, December 19, 1956).

See also **General** (p. 77, above).

East Africa

Constitution. The membership of the East Africa Central Legislative Assembly has been increased from twenty-four to thirty-four, of whom twenty are unofficial members. Each of the territories (Kenya, Tanganyika and Uganda) appoint six unofficial members of whom three are elected; there are two Arab members appointed by the East Africa High Commission (S.I. 1956 No. 1891; Commonwealth Survey, C.O.I., December 11, 1956).

Report. The East Africa High Commission Annual Report, 1955, has been published by the Colonial Office.

Falkland Islands and Dependencies

Report. The Colonial Report, 1954 and 1955, has been published by the Colonial Office.

Gambia

See **West Africa** (pp. 82–83, below).

Gold Coast

See **West Africa** (pp. 82–83, below).

India

States. The Indian States Reorganisation Act, adopted by the Indian Parliament in September, 1956, came into operation on November 1. The number of States has been reduced from twenty-seven to fourteen, together with six centrally-administered territories (Commonwealth Survey, C.O.I., November 13, 1956).

Jamaica

Report. The Colonial Report, 1955, has been published by the Colonial Office.

See also **General** (p. 77, above).

Kenya

Constitutional proposals. Following the recent elections in Kenya, proposals for constitutional changes, agreed in negotiations between European, African and Asian unofficial members of the Legislative Council, and presented through the Governor, have been accepted by the United Kingdom Secretary of State for the Colonies. One of the aims of the proposals, which were announced in a statement issued in Nairobi on October 19, is to strengthen the non-Government side of the Legislative Council. The Council at present comprises, in addition to the Governor and the Speaker, twenty-six *ex officio* and nominated members and twenty-eight unofficial members (six of whom are Ministers and three parliamentary secretaries).

The main proposals recommended by the unofficial members are the following:

1. There should be immediate appointments to four additional seats in the Legislative Council: two additional seats for African representative members and two further seats on the non-Government side of the Council for persons nominated by the Governor from names submitted by the Kenya Board of Agriculture and by the Kenya Board of Commerce and Industry respectively.

2. The composition of the Council of Ministers should be amended to include four European Ministers instead of three, and two African Ministers instead of one. There would be no addition to the number of Asian Ministers, which would remain at two.
3. Extra seats should be created in the Legislative Council, within the framework of the 1954 constitutional changes [see Commonwealth Survey 19.3.54 2b(34)], with the object of correcting the dis-balance in numbers between the Government and non-Government seats and of providing an opportunity for Ministers to represent a wider section of the community than a single constituency, as at present. An examination should be made of the total number of seats required and the method of selection; the seats would be created after the elections for African members (and one Arab member) in March 1957.
4. Arrangements should be put in hand forthwith for the representation of Arab interests in the Council of Ministers by an Arab member of the Legislative Council to be appointed by the Governor for this purpose.
5. Whatever the outcome may be of the talks concerning the creation of extra seats in the Legislative Council to be held after the elections in March 1957, an additional Arab seat in the Legislative Council should be created. (Commonwealth Survey, C.O.I., October 30, 1956; 558 H.C. Deb. 1427–1428, October 31, 1956.)

Report. The Colonial Report, 1955, has been published by the Colonial Office.

See also **General** (p. 77, above), **East Africa** (p. 80, above).

Leeward Islands

See **General** (p. 77, above).

Malaya

Constitutional proposals. The Secretary of State for the Colonies stated that he hoped to receive the report of the Malaya Constitutional Commission early in 1957 so that legislation conferring independence could be passed by August, 1957 (560 H.C. Deb. 764, November 13, 1956).

Malta

National Insurance and Industrial Injuries. An Order has been made giving effect in England, Wales and Scotland to an Agreement between the Governments of the U.K. and of Malta (S.I. 1956 No. 1897).

Nigeria

Commission of Inquiry. The public sittings of the tribunal investigating the affairs of the African Continental Bank, Ltd., ended on November 16, 1956 (*The Times,* November 17, 1956; see [1956] P.L. 404).

Rhodesia and Nyasaland

Federal Cabinet. On October 31, 1956, Lord Malvern, the Federal Prime Minister, resigned. The Deputy Prime Minister, Sir Roy Welensky, formed a new Government (Commonwealth Survey, C.O.I., November 13, 1956).

St. Helena

Report. The Colonial Report, 1954 and 1955, has been published by the Colonial Office.

Sarawak

Debate. The House of Lords debated the situation in Sarawak with particular reference to the new constitutional arrangements being made by

H.M.'s Government and to economic, social and educational considerations (200 H.L. Deb. 328–368, November 15, 1956).

Sierra Leone

House of Representatives. An order has been made increasing the size of the House from thirty-two to fifty-eight members. A Speaker and Deputy-Speaker replace the president and vice-president. The new House consists of four *ex officio* members (the Chief Secretary, the Chief Commissioner for the Protectorate, the Attorney-General and the Financial Secretary), fifty-one elected members (fourteen from the Colony and thirty-seven from the Protectorate) and two nominated members (appointed by the Governor) and the Speaker. The new House will be elected on a revised and broad franchise (S.I. 1956 No. 1893; 558 H.C. Deb. 145–146, October 31, 1956).

And see **West Africa** (pp. 82–83, below).

South Africa

Constitution. The Appellate Division of the Supreme Court of South Africa gave judgment, on November 9, 1956, in the test case brought before it to challenge the legislation passed by the South African Parliament in 1955, by which the membership of the Upper House, the Senate, had been increased. By a majority of ten judges to one, the Appellate Division dismissed an appeal against the unanimous decision of the Cape Division of the Supreme Court, announced on May 18, 1956, refusing an application for an order declaring the Senate Act invalid.

The effect of the judgment is to uphold the validity of the South Africa Amendment Act of 1956, passed by the South African Parliament after the Senate had been reconstituted, which itself revalidated the 1951 legislation designed to remove coloured voters in Cape Province from the common electoral roll. In future, Cape coloured voters will elect four Europeans to represent them in the South African House of Assembly and two Europeans to represent them in the Cape Provincial Council; there will also be two Europeans to represent the interests of the Cape coloured population in the Senate (Commonwealth Survey, C.O.I., November 27, 1956; and see *The Times*, November 10, 1956).

Tanganyika

Report by H.M.'s Government in the U.K. to the General Assembly of the United Nations on the Trust Territory has been published by the Colonial Office.

See also **East Africa** (p. 80, above).

Tonga

Report. The Colonial Report, 1954 and 1955, has been published by the Colonial Office.

Trinidad and Tobago

Report. The Colonial Report, 1954, has been published by the Colonial Office.

See also **General** (p. 77, above).

Uganda

See **East Africa** (p. 80, above).

West Africa

Court of Appeal. Under the West African Court of Appeal Orders in Council, 1948 and 1955, only a person who is a judge in one of the Territories within the court's jurisdiction (the Gold Coast, Sierra Leone and the Gambia) can be appointed to act as a member of the West African Court of Appeal. An Order has been made to permit acting appointments as members of that court of persons who have been judges of the Supreme Court of any of those Territories or of Nigeria; and to validate the appointment, which was made by oversight, of a person who was not a judge in one of those Territories, but had been a judge in Nigeria (S.I. 1956 No. 1700).

Zanzibar

Constitutional proposals. The Secretary of State for the Colonies said that the decree providing for constitutional changes came into operation on September 15, 1956, and the number of representative members of the Legislative Council has been increased to twelve of whom six will be elected by common roll elections in July 1957 and six will be nominated (558 H.C. Deb. *185–186*, November 1, 1956).

BOOK REVIEWS

THE PEOPLE AND THE CONSTITUTION. Second edition by CECIL S. EMDEN. [Oxford: Clarendon Press. 1956. 339 pp. 42s.]

THIS is a valuable contribution to English constitutional history, well written and scholarly in approach and its importance was generally recognised by reviewers on its first appearance in 1933. Its theme is one which hitherto has been only vaguely understood—the part played by the people, *i.e.*, the electorate, in the process of government. It is a part which appears to have grown with the steady advance towards adult suffrage since the first Reform Act in 1832, and which has culminated in the theory of "the mandate"—a theory the implications of which are carefully and dispassionately analysed by Mr. Emden. As might be expected, this leads Mr. Emden to consider whether the introduction of a referendum would carry the element of popular influence in government further than is the case at present, and on this point the author reserves judgment. What will surprise many readers, however, is the extent to which the possibility of a referendum has been discussed by leading statesmen of all parties at various times. When the possibility was seriously mooted at the time of the constitutional crisis of 1910–1911 it was not something suddenly introduced to bolster up the claims of the House of Lords to act as arbiters of the constitution. It was something which had been long considered. Not unnaturally, Asquith firmly rejected the suggestion. When the matter was raised again at the Conference on the Reform of the Second Chamber in 1918, it was once again rejected as tending to lower the authority of Parliament. Nevertheless, the Swiss experience is to the contrary (p. 301). One might have wished that the author had here pursued the question into Australian and American constitutional practice. In some states of the United States, the referendum has had a lengthy history, although some have discarded it after a brief trial. Whether the question will again become a live issue if the reform of the House of Lords is ultimately tackled is not yet clear.

Mr. Emden cannot see in the constitutional history of the past twenty-three years since his book was first published, any clear development of the theory of the people's mandate, eventful though these years have been, and his concluding observations contain a warning which cannot be ignored if democracy in these islands is to remain an effective reality. It is that "an electorate like ours, growing rapidly in ability to understand political factors, must not be allowed to discover that their alleged influence on politics is ineffective because it is too frequently disclosed as indefinite and disputable." The result of failure, in the author's opinion, would be disillusionment, and eventually apathy to government as such. This warning has particular force in an age when government has so enormously extended its functions, and when its impact upon the citizen can produce widespread irritation. It is, in fact, the growth of this attitude which has led some observers to suggest that in recent elections, the bulk of the votes have been cast *against* things, rather than *for* policies. It is therefore to be hoped that aspiring politicians will digest the lessons embodied in this book.

G. W. KEETON.

THE LOCAL GOVERNMENT OF THE UNITED KINGDOM. Fifteenth edition by JOHN J. CLARKE, M.A., F.S.S. [London: Pitman. 1956. xii and 684 pp. 30s.]

IT is not an easy task to write a textbook on local government which is sufficiently lively to retain the interest of the student and the general reader, yet sufficiently informative to enable the student to pass the professional examinations of the Law Society or the various associations of local government officers. The sheer bulk of statutes and regulations dealing with local government matters presents a difficult task of selection for the writer, and the fact that there is little common law and proportionately few judicial decisions on this legislation compared with its volume, makes it so easy for him to attempt no more than a verbal simplification of that part of it which he does choose to deal with. Unfortunately, the book under review does not even approach a balance between interest and comprehensiveness, and it cannot be recommended as suitable for a student who wants to understand his subject thoroughly, or for the general reader who wants to get a general picture.

The note on the dust cover of the book claims it to be a comprehensive work which deals with all aspects of local government. This claim is certainly justified if it is intended to mean that there is no topic in the field of local government which is not touched on somewhere. But comprehensiveness is a virtue only if accompanied by an orderly method of exposition which assumes that the reader knows little about the subject and leads him progressively to a full understanding. The book does not do this. It consists largely of undigested extracts from statutes with little or no explanation and arranged in no particularly attractive order. Moreover, when the desire for comprehensiveness runs to setting out in alphabetical order the subjects in respect of which local authorities may enact by-laws under the Public Health Acts (p. 177) one may reasonably ask whether the information is worth having, and whether students will not be led to learn it by heart in the expectation that they may be asked to recite the list in their examinations.

The preface explains the difficulties the author has found in shortening the book from some 900 pages in the 14th edition to just over 600 pages in the present one. It would have helped economy of space if the history of local government (pp. 30–56) and the chapter on the central Government Departments (pp. 70–84) had been shortened, and the chapter on the courts (pp. 85–89) had been confined to an account of the courts which are concerned with local government, namely, petty sessions, quarter sessions and the Queen's Bench Division of the High Court.

The chapter on Housing (pp. 227–293) is misleading in that it first sets out the Housing Act, 1936, as originally enacted, and relegates the important modifications made to it by the Housing Repairs and Rents Act, 1954, to a note, one page in length, at the end of the chapter. The reader is not told of housing authorities' powers to purchase unfit houses compulsorily instead of making demolition orders in respect of them, and although the decision in *Marriott* v. *Minister of Health* [1937] 1 K.B. 128 is fully set out on p. 244, it is nowhere stated that it has been overruled by section 14 (2) of the 1954 Act.

The account of the Town and Country Planning Act, 1947 (pp. 303–306), consists of little more than a summary of the ten parts of the Act. There is nowhere any explanation of the contents and effect of development plans, planning appeals to the Minister are not mentioned, and the Town and Country Planning General Development Order, 1950, is nowhere referred to.

The law relating to drains and sewers can only be understood if dealt with historically, progressing from the Public Health Act, 1875, to the Public Health Act, 1936, by way of the adoptive provisions in the Public Health Act (Amendment) Act, 1890, relating to single private drains. Moreover, the law relating to drains and sewers constructed under the 1875 and 1890 Acts is still different from that applicable to drains and sewers constructed since October 1, 1937. The book, however makes no such distinction, and one is led to believe that all drains and sewers, whenever laid down, are uniformly governed by the 1936 Act.

It would be uncharitable to multiply complaints. The sympathy the author deserves in respect of the difficult task he has chosen is attested by the absence of any really satisfactory students' book on local government. The book under review, however, will never give such satisfaction unless it is completely rewritten with an entirely different approach to its subject.

ROBERT R. PENNINGTON.

ANNUAL SURVEY OF SOUTH AFRICAN LAW—1955. By the FACULTY OF LAW, UNIVERSITY OF WITWATERSRAND. [Cape Town: Juta & Co. 1956. xxxi and 353 pp. 45s.]

THE Annual Survey of English Law, formerly produced by the Law Faculty of the London School of Economics, failed, alas, to survive the war. But it had not lived in vain for it inspired similar surveys in other countries. Of those the South African Survey has already established itself as particularly valuable to lawyers in all the common-law countries.

Readers of this Journal will turn first to the chapter on Constitutional Law, and this, in the 1955 issue, is undoubtedly the chapter of greatest interest containing, as it does, an admirable account of the constitutional issue which has so unhappily divided the Union. The last stage (last, from the legal aspects anyway) of the prolonged battle over the Cape Coloured Vote has been fought since the Survey appeared, but its first thirteen pages and pages 17–19 are essential reading for a proper understanding of the decision recently handed down by the Appellate Division. Of almost equal interest is the critical account (pp. 23–27) of the Departure from the Union Regulation Act, No. 34 of 1955, making it an offence to leave South Africa without a valid passport or equivalent document. As the learned writer of this chapter remarks (at p. 26): "These are grave times, and the threat to the Western way of life is ever present. Nevertheless there must be many to whom the thought of one's leaving the Union resting entirely in the hands of the Executive, uncontrolled by the courts, must raise deep feelings of misgiving." And interesting comparisons are drawn with the legal position in other countries in the Western world.

Among the developments of interest noted in other chapters are (pp. 82–83) the Regulation of Monopolistic Conditions Act, No. 24 of 1955, which should be compared with our recent Restrictive Trade Practices Act, 1956, and (p. 159) the successful raising, on a charge of murder, of the unusual defence that the accused acted mechanically during a nightmare. Every chapter, however, contains material which cannot be ignored by specialists in the relative branch of law, and all maintain the high standard which we have come to expect from the learned contributors. Once again we are indebted to the University of Witwatersrand for so successfully undertaking a project which necessarily involves an immense amount of labour.

L. C. B. GOWER.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN INDIA. By A. T. MARKOSE. [Madras: Madras Law Journal Office. 1956. l and 752 pp. 35s.]

IN his preface Professor Markose craves the indulgence of Indian and other readers. "To write a book on a subject out of the beaten track is hazardous and to attempt it on a comparative basis is still more so." This is, in fact, the first book of its kind to have been published in any Commonwealth country. But most of his readers are likely to agree with the opinion of the Attorney-General of India, expressed in the foreword, that the author "has written a book of which he can be justly proud." To the Indian practitioner it will be invaluable. It is also of considerable interest to an English student of administrative law, not only because of the comparisons and contrasts drawn between the English and Indian rules but also because of the useful and sometimes penetrating analyses of the English decisions.

In India the rules of English law were directly introduced only for administration by the courts of the presidency towns of Calcutta, Madras and Bombay. These courts had jurisdiction to award the prerogative writs. In the rest of the country, until the coming into force of the present Constitution, the courts had no power to award the prerogative writs, but they had acquired jurisdiction to administer the main substantive rules of English public law by virtue of a statutory direction to apply " justice, equity and good conscience." Today all the superior courts have jurisdiction to issue the prerogative (or extraordinary) writs, which are also of great significance as the principal means of protecting and enforcing the fundamental rights guaranteed by the Constitution. Professor Markose is mainly concerned with the exposition of the detailed rules governing remedies against the Administration. He deals exhaustively with habeas corpus, certiorari, prohibition, quo warranto, mandamus, injunctions and the action for a declaration. He also has separate chapters on classification of administrative powers, pleading and practice, statutory appeals and administrative finality, as well as long introductory chapters of a general and historical character. But there is no separate treatment of the important topic of control of discretionary powers; one eventually finds most of the material buried in the chapter on mandamus. In a work of this size the rules of natural justice would also seem to warrant more exhaustive consideration. The author stresses their importance in Indian administrative law by reporting a dialogue between himself and a practitioner before administrative tribunals:—

> " J.: M., what does the judge ask you when you stand up in court on behalf of your client?
>
> " Myself: The judge will ask me what arguments I have to support my client's case.
>
> " J.: But if I get up to place the arguments to establish my client's case before the officer he will remark: ' So you have come to argue with me.' "

Ever since the days of the East India Company the Indian courts have maintained a robust attitude towards the pretensions of the Executive. The full immunities of the Crown were not extended to the Company, and the position remained substantially unchanged when sovereignty was transferred to the Crown in 1858. Claims by governments to withhold documents from disclosure have not been accorded the indulgence typified by *Duncan* v. *Cammell, Laird & Co.* Injunctions and mandamus will issue against governments. The scope of mandamus is, indeed, the most interesting feature of judicial review in Indian administrative law. It will issue not merely to compel the performance of a public duty, but to order an official to abstain from doing a wrongful act or to order an administrative tribunal not to exceed its jurisdiction. Hence it overlaps with the injunction and prohibition. Moreover, it will lie, without certiorari, to order a rehearing by a tribunal which has exceeded its jurisdiction. Some of the English decisions on mandamus to licensing tribunals are hard to explain except upon the assumption that mandamus is largely co-extensive with certiorari for excess of jurisdiction; but the English courts have not overtly laid this down as a principle of law. The Indians on the other hand, have gone the whole hog.

The book is fully documented and there are many references to periodical literature in England and the United States. But commendation must end at this point. The index is inadequate, the table of cases is grossly inaccurate and the number of misprints, incorrect citations and other minor errors is quite staggering. Looking through the table of cases, we find among the B's, for example, names as unfamiliar as *Banbury* v. *Fuller*, *Bernard* v. *National Dock Labour Board* and *Buddulph* v. *St. George's Vestry*. The present writer was intrigued to find a well-known English law journal which had published one of his articles cited as the " Mad.L.Rev." If more care had been devoted to these small matters, and to more important problems like the arrangement of topics, economy of words and style of presentation, the merits of the book would have been far more obvious. In its present form it is still a notable contribution to the literature of public law.

S. A. de Smith.

PUBLIC LAW

Summer, 1957

COMMENT

THE separation of persons is a more real basis for the avoidance of tyranny and a greater safeguard against maladministration than the separation of powers. That one person should have the right to review the actions of another is a more important principle than that the legislative, judicial and executive powers should be in different hands. And the " English " constitution is in practice based on the better of these two theoretic alternatives. But by " persons " it is sometimes necessary to mean institutions. If " persons " merely meant individuals, then a self-protective instinct of solidarity could make the separation less effective. If, that is to say, we relied simply on a system of hierarchical, internal checks whereby individuals within the same institution were put in positions of authority, one above another, there would be a considerable danger that the mistakes of juniors, although corrected by their seniors, might also be concealed from those outside the institution. Clearly the hierarchical system must be adopted in any governmental or other institution of any size; and clearly, also, " covering-up " inevitably and constantly occurs. But the existence of another institution with powers of investigation, criticism and public pronouncement does much to prevent petty and great tyranny and to reveal maladministration.

In the modern State, this older belief in the value of checks and balances has produced new institutions to take their place alongside Parliament and the courts. Administrative tribunals often perform the dual function both of playing a part in the operation of a governmental service and of checking the actions of other institutions. When the new national insurance scheme was introduced by the Act of 1946, the determination of claims and questions was left largely to local tribunals and a Commissioner, with his Deputies. This followed the earlier pattern. But the application of this idea to similar problems arising in the administration of payments for industrial injuries was new. Under the Workmen's Compensation Acts, questions of law were determined by county courts, the Court of Appeal and the House of Lords. And the question whether an accident was one " arising out of and in the course of " a workman's employment was regarded as a question of law. Sir Carleton Allen wrote in an earlier issue of this quarterly: " . . . as is usual in such an unwieldy mass of precedent, the law itself became extremely confused and confusing . . . if there was ever a case for limited appeals and a special jurisdiction, it was this."

So there was established the present system of adjudication, with some questions reserved to the Minister, some to local tribunals and the Industrial Injuries Commissioner, and some to medical boards and medical appeal tribunals. Only from the Minister was a right of appeal given to the courts, and then only on a question of law. Decisions of the Commissioner (or one of his Deputies) and of medical appeal tribunals were, said the Act, to be " final." While the Act required the Commissioner and his Deputies to be barristers of not less than ten years' standing, it said of medical appeal tribunals merely that they should consist of a chairman and two medical practitioners; nor do the regulations require the chairman to be legally qualified though in practice he is appointed after consultation with the Lord Chancellor. Medical appeal tribunals are required to determine whether the accident resulted in a loss of faculty, and the degree of disablement.

During the last nine years, the system has worked well, and has become accepted as an improvement on the procedure under the Workmen's Compensation Acts. There has been no responsible demand that the jurisdiction of the courts to determine questions of law should be restored. Even those who guard the Rule of Law so zealously and who often see great dangers in any tribunal other than the " recognised courts " determining any disputes have not indicated that they feel uneasy about the Commissioner and the other bodies constituted under this system. Now, however, a decision of the Court of Appeal threatens the whole structure. In *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 2 W.L.R. 498, a medical appeal tribunal had to assess the degree of disablement when a man, whose right eye had been severely injured and whose left eye had been partly injured in 1936, suffered a second injury in 1955 by which the condition of his left eye was so severely aggravated that he was almost totally blind. The tribunal assessed the aggravation at only 20 per cent. Regulations made under the Act required that in such a case the blindness in both eyes was to be deemed to be due to the accident. It would seem, therefore, that the tribunal either overlooked or misinterpreted the regulations. The injured person applied to the Court of Appeal for certiorari to quash the decision of the tribunal on the ground that it had made an error of law which appeared on the face of its decision. The court issued the order quashing the decision. Denning L.J., after deciding that there was an error of law on the face of the record, proceeded to hold that the provision in the Act, which stated that the decision of the tribunal was to be "final," did not preclude the court from quashing it by certiorari. Quoting words which he had used in another case, he said: "Parliament only gives the impress of finality to the decisions of the tribunal on the condition that they are reached in accordance with the law." Romer L.J. and Parker L.J. came to the same conclusion.

Now there are two extreme positions from which this decision can be looked at. One is to consider it as a blow struck for freedom, to find it an occasion for the throwing of hats in the air, to regard it as a victory for the rule of law over the dark forces of governmental power; and so forth. The other is to deplore the decision, to call the Court of Appeal reactionary and to say that where Parliament has clearly intended an administrative tribunal to exercise certain jurisdiction exclusively, then the courts should interpret the meaning of "final" in that sense. Neither of these attitudes will do. It is clear that the medical appeal tribunal made a mistake; the Ministry themselves conceded this. But, of itself, this is not enough. It does not follow, because an administrative tribunal may make mistakes, even on points of law, that therefore the courts must always have the power to rectify them. To take this view would be to throw away all the advantages of the present system and, as we have seen, these are considerable, in this matter of industrial injuries, when compared with former systems. What is necessary is that the tribunal, or some superior administrative tribunal, should contain a lawyer of sufficient experience and ability so that mistakes are not made. The chairman of a medical appeal tribunal is not required to be a lawyer of this eminence. The Industrial Injuries Commissioner is and it is hardly conceivable that he would have made such a mistake. What is wrong in the system is that the medical appeal tribunal is the final court for the determination of such questions.

Unfortunately, the decision, as it stands, goes much further than establishing a right of review by the courts of the decisions of medical appeal tribunals. Romer L.J. said: "But in the nature of things these and similar inferior tribunals (and there are many of them nowadays) are bound to go wrong from time to time in matters of law. Their members consist in the main of people who have devoted their lives to activities far removed from the study and practice of the law; and neither by training nor by experience can they be expected to have that knowledge of principles of construction which is so necessary for the proper understanding and application of the various statutes and regulations which often come before them. Injustice may well result, and a sense of injustice is a grievous thing. I, therefore, think (and I have said as much before) that it is not in the public interest that inferior tribunals of any kind should be ultimate arbiters on questions of law." This argument is: *because* inferior tribunals are composed largely of laymen, *therefore* the courts should review their decisions on questions of law. But the Lord Justice is generalising from a particular. Many administrative tribunals (notably the National Insurance and Industrial Injuries Commissioners) are expert lawyers of eminence. Yet the effect of this decision is to empower the courts to review their findings also. Denning L.J. said so expressly in this case. He added: " But they are so well versed in the law and deservedly held in such high regard that it will be rare that they fall into error such as to need correction." But that is not the point. The mistake here was simple but there are many dubious questions of construction of complexity where no clear " correct " decision is ascertainable. The decision in this case would, for example, seem to give a right of review to the courts whenever the Commissioner decides whether an accident arose " out of and in the course of employment." The decision in such matters is not one of rightness or wrongness. When the House of Lords by a majority reverses the unanimous Court of Appeal, it is meaningless to say that the House of Lords is " right " and the Court of Appeal is " wrong." It is simply a question of which body shall have the final determination.

So we come back to the place where we began. A system of industrial injuries benefit is set up. Rules are devised by a Government Department for its administration and for the details of its substance. Where disputes arise, it is not the Department which is to decide them but separate, distinct tribunals. The separation is not one of administrative and judicial powers but of institutions. And, by and large, these institutions, these tribunals, are thought of as separate from the Department. Questions of law (other than those which concern procedure or jurisdiction) are, under the Act, to be determined by these tribunals and (consciously breaking here with the past) not by the courts. It would be a great misfortune if this decision were left untouched and if, as a result, the Commissioners' decisions were made subject to judicial review. The remedy is not difficult to find. What is needed is a short Act of Parliament which would use the words necessary to make clear that the decisions of the National Insurance and Industrial Injuries Commissioners were not to be subject to review by the courts on questions of substantive law; and which would give a right of appeal on questions of law from medical appeal tribunals to the Industrial Injuries Commissioner.

AN INSPECTOR-GENERAL OF ADMINISTRATION

Now that the Franks Committee has almost finished taking evidence about administrative tribunals and inquiries and is considering its report, the time may be ripe for a new suggestion which has not, as far as I am aware, been put forward. I have come to it after reading the evidence submitted to the Committee and pondering, as a comparative lawyer, on arrangements which have long been in force in foreign countries.

It is, shortly, that there should be appointed an Inspector-General of Administration with the same tenure and relation to Parliament as the Comptroller and Auditor-General, that is to say, he should hold office during good behaviour and be removable only upon an address by both Houses of Parliament. It should be his duty to investigate complaints of maladministration and he should be empowered, if he cannot obtain satisfaction in any other way, to take legal proceedings at his discretion or to report to a Committee of the House of Commons similar to the Public Accounts Committee. Where, therefore, he is satisfied that he could and ought to take legal proceedings to have an illegal act quashed or prosecute a public officer or authority for a criminal offence, he would be empowered to do so. He should also be empowered to lend his aid to any person who in his opinion is entitled to bring an action for damages. So far he would be very much in the position of a public prosecutor with powers extending to civil as well as criminal proceedings. If, on the other hand, to use the words used by Professor W. A. Robson in his evidence before the Committee (Thirteenth Day, p. 494), when pleading for the establishment of a general Administrative Appeal Tribunal, he met with a case " where a public authority has acted or is about to act, or refrains from acting, in a manner which is unduly harsh, unjust, improper or lacking in reasonable consideration for the interests of any person or persons," and he could not by argument or negotiation obtain redress for the complainant, he would report the case immediately to the House of Commons Committee, and so ensure, at the least, publicity. The Inspector-General should have power to inquire into the conduct of all local authorities, as well as administrative tribunals and Government Departments, and indeed into the exercise of the administrative functions of the ordinary courts.

My suggestion is closely modelled on the practice in Sweden, where two such officers have long been appointed by Parliament for civil and military affairs respectively, but I have introduced modifications to suit our conditions. It also bears a fairly strong resemblance to the institution of the *Prokuratura* in Soviet Russia, the officers of which have many other tasks besides the prosecution of offenders. Similar arrangements for receiving complaints are, I understand, in force in the United States army.

The plan would afford a number of advantages. In the first place, it would remove from the complainant the enormous burden of costs that litigation entails, particularly against public authorities, while at the same time ensuring, through the discretion entrusted to the Inspector-General, that proceedings would not be brought unless they were reasonable. I do not suggest that the Inspector-General should have a monopoly; it should still be open to anyone to bring proceedings at his own expense and at his own risk. However, few of us would be able and willing to take such a risk.

The plan would go much farther than any plan so far suggested to solve the problem of secrecy in administration. It is hard to see what reasonable objection could be made to the disclosure of documents to an official holding the rank of Inspector-General, which would be that of the permanent head of a Government Department. If it be said that he would have to work through subordinates, arrangements could easily be made for the existence or the contents of highly secret documents to be disclosed to him alone. Disclosure to the Inspector-General would not automatically involve disclosure to a complainant or even a court; but the complainant would be in a much better position than he is at present because he would know that all documents had been seen by an impartial person.

The Inspector-General would probably take a great load off the shoulders of Members of Parliament, who could refer complaints to him, if indeed complaints did not go to him direct. Almost certainly Members would be able to devote more time to legislation and to questions of general policy. But there would be no question of stopping direct access to one's Member of Parliament.

The Inspector-General would become the eye, not only of individual complainants and the general public, not only of Parliament, but also of the Cabinet, of Ministers and of the higher civil servants in Government Departments.

Since he would be a permanent official, entirely independent of the Government, with standing authority to consider all cases, the investigation of particular abuses would not be dependent on the appointment of special committees; though nothing would be done to stop such committees being set up in case of need.

Since the Inspector-General would, like the Comptroller and Auditor-General, almost inevitably be a higher civil servant nearing the end of his career, he would, while preserving impartiality and independence, not only have experience of administration, but be able to speak to the officials in departments as one of themselves. Thus he might be able to do what would be worth all the rest put together, namely to persuade the departments to get rid of certain unfortunate habits and to raise their standards of fairness and consideration to the public.

There would still be cases which could not be handled by the Inspector-General, especially where what the complainant is really objecting to is a genuine matter of policy. Thus, although much of what was contained in the Crichel Down case would have come within his province, he could not have passed on the question of pure policy, whether a Conservative Minister of Agriculture was to maintain his Labour predecessor's policy of not relinquishing land acquired compulsorily by the Crown. On this two things could be said. In the first place, a person with the position and experience of the Inspector-General could be trusted not to be put off by arguments of policy in the large number of cases where questions of fact or law are made to masquerade as questions of policy; and secondly, if genuine questions of policy arose few of us would wish him to intervene.

Mr. H. W. R. Wade showed in his evidence before the Committee (Fourteenth Day, pp. 552–555) that he too was preoccupied with the need for some permanent body, which he called an Administrative Court, not only to act as a Court of Appeal but to formulate rules and standards of procedure from time to time. My proposal is not the same as his, though I imagine that they would in practice overlap. Still less does it coincide with Professor Robson's suggestion of a general Administrative Appeal Tribunal, for I would leave the task of judging administrative cases to the ordinary courts, with some extension of jurisdiction and improvement of procedure. It would avoid the main objection to an adoption of anything like the French Conseil d'État, that it implies a part of the administration judging the other part. I am well aware that the Conseil d'État has in the most marvellous way combined the virtues of administrators and judges, but it is not for us.

F. H. LAWSON.

CHANGES IN LOCAL GOVERNMENT FINANCE

THE Government produced in February its long-awaited statement on local government finance. There are to be no startling innovations in the general pattern of local revenue. The Royal Institute of Public Administration (whose proposals are reviewed on page 188) has laboured in vain to discover any supplementary source of local taxation which commends itself to the present Government. This is perhaps a pity, but it is certainly no surprise. The instincts of both the Conservative party and the Treasury are heavily weighted against allowing local authorities to levy new taxes, and it would require at least a Goschen to overcome this resistance. Just possibly the next Labour Government will be willing to cast its net wider.

Within this limitation, the Government's new policy forecasts some important changes. Essentially, it has two aims: to strengthen the rating system and to place central-local financial relationships upon a new and improved basis. So far as the rating system is concerned, the " strengthening " is more apparent than real, at any rate in the short run. Having conceded last December a 20 per cent. reduction in the rateable value of shops and commercial premises, the Government now proposes to double the assessments of industry and freight transport by fixing these at 50 per cent. (instead of the present 25 per cent.) of full values. Roughly speaking, the local authorities are to get back later on the swings what they have just lost on the roundabouts, leaving them with an awkward interim period during which rates must be raised to offset the recent " shopkeepers' concession."

However, the long-term outlook for the rating system is different and more complicated. On the one hand, most believers in local government will count it a clear gain that the anachronism of industrial derating has at last been modified. This clears the ground for further " modifications," and for the application of more uniform and rational principles of valuation to all classes of property. But, against this, the introduction of such principles is bound to encounter fresh obstacles. The new adjustments will leave commerce rated at 80 per cent. and industry at 50 per cent. of full current values, while residential property is rated at 100 per cent. of 1939 values. It follows that any attempt to place all three categories of property upon the same basis at the next quinquennial revaluation would hurt the householder most. Even if his resistance to such a change could be overcome, the result would be to leave the rating system still weaker, and less elastic as a source of revenue, than is already the case.

The position of agriculture presents a final complication. Agriculture is at present completely derated and, despite the significant support of the County Councils Association for the principle of agricultural rerating, the Government has apparently decided to continue this privileged treatment. Under the Agriculture Bill now before Parliament, the Government binds itself in effect to compensate in the value of its price and production guarantees for any increase in the level of agricultural costs. No doubt rates might be expressly excluded from this generous provision, but no doubt also Ministers are shy of the political row which this adjustment would entail. But in addition to the plain equity of rerating there is the fact that the more rural counties are at present far too heavily dependent upon Government largesse for the general health of local government. Thus, even if the Government is foolish enough to provide farmers with full compensation, at least a partial rerating of agriculture should be considered essential.

Nothing can remove the intrinsic limitations of the rating system, but there is no adequate substitute for rates in sight. The important aim, therefore, is to make the system as viable (*i.e.*, as elastic and acceptable) as possible, particularly since total local expenditure can be expected to go on rising and local authorities need some margin of resources with which to finance experiments and projects of their own. To realise this aim, it is essential to require eventually a full contribution from commerce and industry with perhaps (as a compromise) a 50 per cent. contribution from agriculture. Viewed from this standpoint, housing probably should not be asked to shoulder more than 75 per cent. of full current values; alternatively, all houses might be fully assessed but larger statutory deductions could be allowed for small properties. (An additional possibility is that rating valuations should be increased for house-plots over a certain size, say one-tenth of an acre. This proposal would both strengthen the rating system and assist the town planning objective of inhibiting too much sprawl.) Judged by these criteria, the proposed up-rating of industry is a small first step along a road which no Minister, as yet, has had the courage to chart.

The Government's proposals for reshaping the pattern of its own grants to local authorities are bolder and more interesting than its rating adjustments. They owe more to principle and less to politics. It is proposed that almost two-thirds of total Exchequer aid (instead of the present one-sixth) should be paid in the form of general grant-in-aid, not tied in any way to individual services. The present Exchequer equalisation grant would be continued, with certain modifications (including the direct payment of grant to county districts) which were proposed by the Edwards Committee. But a large new general-purpose grant would also be introduced, which would replace entirely the present specific grants for education, child care, fire services, and health services. Its distribution would be related primarily to size of population, " weighted " to allow for the extra burden imposed by a high proportion of children or old people. The equalisation grant would be relied on to compensate for varying local resources, while the new grant would allow (very roughly indeed) for varying local needs. These are Mr. Henry Brooke's general intentions, though the details have still to be agreed with the local authorities.

The Minister, in his statement to Parliament, gave two reasons for this proposal. First, he argued that it would entail less central control—or, at any rate, would minimise the danger of " an excessive degree of detailed central supervision." This view clashes with the conclusions of a recent research study sponsored by the Institute of

Municipal Treasurers and Accountants,[1] which denied the existence of any relationship between close central control and the present system of percentage grants. It also does not square very well with the Minister's subsequent statement that he will take steps (including the procurement of additional powers, if necessary) to ensure that standards are in fact maintained. Freedom of choice is surely unreal if there is no freedom to sin.

On the other hand, it needs to be remembered that central-local relations are much less a matter of formal powers than of " atmosphere." There is undoubtedly a subtle and probably delayed relationship between finance and control. If a backward local authority is receiving a fixed grant, and must find the whole balance for further improvement out of its own pocket, is it really likely that the Minister will chivvy the council as strenuously as if he was making an automatic contribution to additional expenditure?

Secondly, Mr. Brooke stated that the new system would secure greater certainty about the size of Exchequer commitments. Mr. Chamberlain used precisely the same argument in 1929, and it is not a very good argument. It is of course right that local councils should carry the cost of their own ideas or follies; but the national taxpayer is far better equipped than the local ratepayer to meet fluctuations in the general level of costs in the principal public services. The new general-purpose grant will apparently be revised about every three years, and may contain some allowance for foreseeable costs in the interval. But evidently ratepayers will have to carry a heavier burden of marginal adjustments (if not a heavier absolute burden), and their likely response will be to insist upon minimum service " and no frills "—thus defeating the Government's professed aim of encouraging variety and experiment.

Here indeed is the basic dilemma. Given the limitations of the rating system and the present negative attitude of ratepayers, a shift in financial responsibility from Government to local authorities seems likely to be more productive of a sluggish performance of duties than of fruitful innovations. The position will of course be improved if the rating system is gradually made more rational and less regressive, and if ratepayers can somehow be educated to a sense of their new responsibilities. But these results have still to be realised. Meanwhile, Mr. Brooke's aim of giving greater freedom and independence to local government deserves to be warmly applauded. But there will be some doubts as to whether he has set about it the best way.

PETER SELF

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[1] Local Expenditure and Exchequer Grants, I.M.T.A., 1 Buckingham Place, Westminster, S.W.1. 42s.

THE UNION OF 1707 AS FUNDAMENTAL LAW

T. B. SMITH [1]

Two hundred and fifty years ago, on May 1, 1707, the separate kingdoms of Scotland and England merged in the new State of Great Britain, and ceased to exist as persons for purposes of public international law. The merging of one State in another, by cession for example, is well enough known in the annals of international law; but the supersession of *two* existing States by their incorporation in a third which had no prior existence is less usual. Such an incorporating Union, maintaining complete severalty of administration of justice, may well be unique. So far, however, the public international law aspect of the Union has received little notice, and there is general confusion regarding three different aspects of the Union—the Treaty aspect, the constituent aspect and the legislative aspect. Though the new State of Great Britain was a unitary State, the legal systems of Scotland and England nevertheless continued separate. From this fact have resulted many conflicts of jurisdiction and questions of public and private international law. Some of these, though by no means all, have been the subject of serious study. Looking back over a quarter of a millenium, then, I wish to examine a few of the important legal problems which arose at the time of the Union or have flowed from it. Some of these problems, viewed from a political angle, have been the focus for strong emotional feeling. I myself strive for objectivity, and I would fail utterly in the task I have set myself were I to apply standards other than those of impartial scholarship. My conclusions on certain matters differ, I freely admit, to some extent from views which I have formerly stated; and I do not claim that even now I shall necessarily give the right answers to my own questions. Possibly the main service that I can offer is the raising rather than the solving of legal problems concerning the

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Union. The subject has so far claimed the detailed attention of historians rather than of lawyers. The notable exception is, of course, the renowned Dicey—with whom, as will appear, I have the misfortune to differ on some essentials.

THE TREATY

The title of my lecture refers to the Union of 1707. *In limine* let me face the very difficult question—"Was there ever a *treaty* in the sense that that term is properly used in international law?" The mere fact that the Parliaments of Scotland and England purported to ratify a "Treaty," and that a document thus designated is exhibited in the Register House and in the House of Lords, is by no means conclusive of the matter. The expression "treaty," when related to agreements affecting the interests of States, prima facie, of course, suggests to our minds the technical sense of international law—but, especially in the seventeenth and eighteenth centuries, the same expression has been used generally to signify other public compacts reached by negotiation. Thus the so-called "Treaty" of Ripon in 1640–1641 was in fact a tripartite bargain struck between Charles I, the Scottish Estates and the English Parliament: and was no more a treaty *jure gentium* than was *Magna Carta*. Again, the expression "treaty" in the Acts of 1661, cc. 5, 7 and 11, asserting the Royal Prerogative, is used both in a general sense and in that of international law. The Act 7 Anne c. 26 uses the phrase "treat and agree" in what is obviously a domestic context. In short, the references to "Treaty" at the time of Union do not necessarily imply a treaty *jure gentium*.

The procedure for concluding a treaty *jure gentium* between kingdoms would in the usual case have had the following elements. The heads of State (in whom by prerogative the treaty-making power was vested) would have issued full powers to named plenipotentiaries to negotiate on their behalf; these full powers would have been exchanged by the respective delegates and scrutinised; the concluded agreement would have been signed by the plenipotentiaries; the treaty would subsequently have been ratified by the appropriate ratifying power in each State; and documents would have been exchanged embodying the confirmation. At the stage of ratification it would have been incompetent to make material alterations in and additions to the treaty, and it is very doubtful if ratification could have been conditional. The ratified treaty would have created a binding international obligation between States, even though in fact the law-making body of a particular State might have declined to alter the law of that State to give effect to the terms of the treaty—and thus have forced a breach of international obligation.[2] This procedure can be studied almost contemporaneously with the Union in the conclusion of the important series of treaties in 1713–1714, known generally as the Treaty of Utrecht. Queen Anne's message to Parliament on May 3, 1713, was in these terms: " As it is the undoubted prerogative of the Crown to make Peace and War, I have ratified the Treaties of Peace and Commerce with France which had been signed by my order, and have concluded a Treaty with Spain which will be signed at Utrecht as soon as the Spanish ministers are arrived there. I determined from the first, on this extraordinary occasion, to *communicate* these Treaties to my Parliament and have therefore ordered them to be laid before this House." [3] You will observe that the Queen, as head of State, made and ratified the Treaties. Parliament was *then* asked to legislate to give effect to them—and, in point of fact, refused to implement certain articles of the Commercial Treaty with France.[4]

By comparison, the agreement for Union was in effect negotiated by the respective legislatures of Scotland and England; the treaty-making prerogative was apparently laid aside; and the procedure by which final agreement was reached was most unconventional by diplomatic standards. Would Bynkershoek or Vattel, great international law writers of the first half of the eighteenth century, have considered that there was ever in fact a " treaty " between Scotland and England? After much anxious thought I have reached the conclusion that there was in fact a treaty *jure gentium*, but that the content of that treaty is not necessarily to be found in the Articles of Union agreed at Westminster in 1706. This view may seem extraordinary since both Parliaments in 1707 expressly purported to ratify these Articles as a " treaty," and it has been customary for writers to refer to the Articles as " the Treaty of Union." On the other hand, the procedure following the Westminster deliberations seems to my mind quite inconsistent with international practice regarding treaties, and inapt to give the Articles the force of a treaty. It is obvious, of course, that normal procedure would have been impracticable in the circumstances of the Personal Union, since in effect the Queen would have been entering into Treaty with herself.

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[2] *Att.-Gen. for Ontario* [1937] A.C. 326, esp. *per* Lord Atkin, pp. 347–348; McNair, *Law of Treaties, passim.*

[3] *Hansard Parl. Hist.* vii, Queen's Message of May 3. Author's italics.

[4] In modern practice the opportunity is given for Parliament to debate the provisions of a treaty before the head of State completes the formalities of ratification; and " there is a practice now amounting probably to a binding constitutional convention whereby treaties involving a cession of British territory are submitted for the approval of Parliament and the approval takes the form of a statute ": see Statement Prepared by the Secretariat of the U.N. regarding U.K. practice, paras. 16 and 17; also McNair, *op. cit.*, 24. Modern treaties (in the less strict sense) may also be concluded in the form of " governmental agreements."

The closest European comparison regarding constitutional relations and external relations of Scotland and England *inter se* during the Union of the Crowns was probably nineteenth-century Austria-Hungary—but the specialties to which Professor Macartney has drawn my attention make me hesitate to press the comparison too far.

In normal English practice, as has been observed, the Queen in the eighteenth century appointed ambassadors and could both make and ratify a treaty by the prerogative, though the English Parliament might have refused—and (in 1706) would have refused—to implement by legislation such a treaty with Scotland if made without their prior approval and advice. It is more difficult to say what Scottish diplomatic and treaty-making practice was in the eighteenth century. During the Royal minorities, the Estates had assumed the responsibility of appointing ambassadors and receiving their reports. Scotland's last ambassador, Archbishop Beaton, had died in Paris in 1603 just after the Union of the Crowns, and from that time Scotland had been virtually excluded from foreign affairs. Foreign ambassadors were accredited to the Court of the Sovereign in London, while he or she sent Britain's diplomatic emissaries from the Southern Capital. True, in 1640, the Estates sent an emissary to Richelieu, seeking support against Charles I, but that envoy had no real diplomatic status at all. This episode had, nevertheless, an important sequel for our present purpose in that on the Restoration a series of Acts were passed reasserting the Royal prerogative to make treaties, and excluding the Estates from all part in such diplomatic activity.[5] As a result, the Estates and Scotsmen in general were irked by the foreign policy of William and Anne's English ministers, which involved Scotland without any consultation of Scottish interests. Decisions on great issues of peace and war were intimated to the Estates from London days after they had taken effect. Accordingly, shortly before the Union, the Estates reasserted a claim to participate in foreign affairs. In 1703 the Act Anent Peace and War—which was actually touched by the Sceptre and became law—provided that after the death of Anne, no King or Queen of Scotland and England should have the power to make war without the consent of Parliament. " Treaties of Peace, Alliance and Commerce were left to the Wisdom of the Estates of Parliament who shall declare the war." [6] Moreover in the year 1705 an Act was voted providing for Scotland to be represented at the making of any foreign treaty concerning Scotland.[7]

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[5] Acts of 1661, cc. 5, 7 and 11. A.P.S., vii, 13, c. 13; *ibid.*, 18, c. 22; *ibid.*, 44, c. 62.

[6] Godolphin was attacked in the English Parliament for advising the Queen to assent to the Act and to the Scottish Act for the Security of the Kingdom. Both were repealed after the Union by 6 Anne, c. 36 (or 2 in Ruffhead).

[7] A.P.S., xi, 245.

Notwithstanding these developments, in 1706 the treaty-*making* power for the Kingdom of Scotland still clearly pertained to the Royal Prerogative alone.

What, however, of the power of ratification—a power which, as has been stressed, was in England also exercised by virtue of the prerogative? For obvious reasons we can find no precedents regarding the position in Scotland at about the time of the Union or for a century before—but, if we go back to the sixteenth century—a period of considerable diplomatic negotiation by Scotland with France and England, it seems that the Estates had established a constitutional right to participate with the Crown in the ratification of treaties. The sharing of powers of ratification by two or more organs of the State is, of course, familiar in the practice of modern States. Hill Burton brings out an important point when, in discussing the abortive treaty with Henry VIII in 1543, he comments [8] " By Scots practice the treaty had got to be ratified by the Estates, and it was a question whether the Estates would ratify it or dared do so if they would. Under ordinary conditions ambassadors might virtually pledge the Government, and the revisal of their engagements by the Estates might be mere form." Such ratification, I may add,—as did other Scottish treaty ratifications—followed the forms of legislation. At all events the " ratifying " proceedings in 1706–1707, of the Scottish Parliament regarding the Articles of Union —if the Articles could be regarded as the terms of a treaty—were not necessarily anomalous as would have been those of the English Parliament in purporting to ratify a " treaty."

ANOMALIES IN THE NEGOTIATIONS

Let me note the main anomalies in the negotiations for Union in 1706—viewed from the international standpoint. First, the Queen did not appoint plenipotentiaries by virtue of the prerogative, but only Commissioners with limited powers and that *by authority* of Acts of the Scottish and English Parliaments.[9] The vital question of Church government was, moreover, expressly excluded from the Commissioners' deliberations. By their Commissions, moreover, the representatives of the two countries were " to treat and consult " of and concerning a Union, but they were expressly forbidden to conclude a " treaty," as I understand the term *jure gentium*. They were enjoined to reduce their " doings and proceedings " into writing in quadruplicate duly signed and sealed—copies to be sent to the respective Parliaments and to the Queen—whereafter " such further proceedings may be had as We and both the said Parliaments should think fit and necessary for the well and common good of both the said Kyngdoms." The entire consideration of the whole proceedings and the allowing and disallowing of the whole or any part thereof was wholly reserved to the Parliaments of the two countries. The Articles of Union, which were signed and sealed at Westminster on July 22, 1706, have not the characteristics of a treaty concluded subject to ratification; the document was more in the nature of a record of negotiations. The negotiated Articles were then debated from October 3, 1706, to January 16, 1707, in the Scottish Estates, much as a Bill might be debated in the United Kingdom Parliament today. Hill Burton rightly notes [10] that some of the amendments debated and incorporated—for example those regarding the administration of justice and adding " superiorities " to the Article concerning heritable jurisdictions—were scarcely appropriate to ratification of a treaty. Though none of the Articles were disapproved, several minor but important amendments were made,[11] and in addition whole Acts were passed regarding the election of Scottish representatives in the Parliament of Great Britain and for securing the Protestant Religion and Presbyterian Church Government [12]—these Acts becoming, with the amended Articles, part of Scotland's minimum terms for entering the Union. The Articles (as amended), together with the Act for securing the Kirk, were then by a *legislative* Act of the Estates ordained to be the " sure and perpetuall foundation of ane complete and intire Union " under the express condition that the approbation was not to be binding until the Articles and Act should be approved by the Queen with the authority of the English Parliament. The English Parliament for its part was to be free to extend in favour of the subjects of England the additions made in the Articles and to provide for the security of the Church of England without derogating from the force of the Scottish Parliament's ratification. The doctrine of " provisional ratification " and the granting of a blank cheque to supplement the terms of a treaty must strike the international lawyer as somewhat unusual concepts—and at this stage we have not yet got the text of what the complete " treaty " was to be. Subsequently, as we all know, the Parliament of England enacted by the Act 6 Anne c. 11 the terms approved by the Scottish Estates, adding an Act for the security of the Church of England. Then, for the first time, can one find—to adopt the terms of private contract—a possible meeting of wills in unconditional offer and acceptance; albeit the agreement was not obviously a " paction of Princes," but a concurrence of the wills of two representative national assemblies approved (apparently in her legislative capacity) by the head of State in each case. Was this complex and unorthodox agreement a treaty—even if the Articles of Union cannot strictly be so regarded? My view is that the complex of exchanged Acts of the two Parliaments have a threefold significance. First, and to this I shall return immediately, they constituted a treaty *jure gentium*. Secondly, they have the effect of fundamental constituent provisions for the Union. Thirdly, the Acts of Parliament of each country bound the subjects *within that country alone* as would ordinary legislative Acts.

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[8] *Hist. of Scotland*, iii, 205 *et seq.*

[9] The Scottish Act, 1705, c. 4; A.P.S., xi, 295, c. 50; and the English Act, 3 & 4 Anne, c. 6 or 7. The Commissioners were themselves members of the respective legislatures.

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[10] *Op. cit.*, viii, 172.

[11] These were described as " some small amendments, not at all inconsistent but upon the foot of the Treaty " : Portland MSS., iv, 348, 387.

[12] The Act for Securing the Protestant Religion (which is subsequent to framing of the Articles) expressly contemplates a later treaty—" this Act of Parliament . . . shall be held . . . as a fundamental . . . condition of any treaty or union to be concluded betwixt the two kingdoms " ; and " this Act . . . shall be insert and repeated in any Act of Parliament that shall pass for agreement and concluding the foresaid treaty or union."

CONCLUSION OF TREATY JURE GENTIUM

First, as I said, I consider that a treaty was concluded between Scotland and England in the terms of the Act registered in the Books of the Scottish Parliament on March 19, 1707. For the purposes of concluding the Union, on this one occasion the Queen had agreed by statute to exercise her prerogative powers—not as head of State acting *alone*—but in conjunction with her two Parliaments. The purported " ratification " of the Articles by the Scottish Estates and associated legislation were in effect the offer of treaty terms by the Scottish Queen in Parliament to the English Queen in Parliament. The English Act of Union when the Queen gave her assent could possibly be regarded as the acceptance of that offer—though there is the anomaly that the Act to secure the Church of England is only in general terms assented to by the Scottish Estates and has no legislative effect in Scotland. The English Act may thus seem more in the nature of counter offer. Probably the recording by Her Majesty's command of the English Exemplification under the Great Seal of England in the Books of the Scottish Parliament on March 19, 1707, may be regarded as the final stage in concluding the treaty. No objection was made to the terms then registered. Then it was that the Commissioner reported the Queen's satisfaction that the Union was thus concluded; then it was that Seafield could observe, " There's ane end of ane auld sang." Therefore, despite the anomalies and *ad hoc* constitutional expedients, we seem to have a valid international treaty concluded in March 1707. There was on this view no ratification of the treaty, but this is not indispensable when heads of State or governments are dealing directly with each other, and when it is clear when the agreement is to come into force.[13] Any informalities were cured by subsequent homologation. If either Scotland or England had attempted to resile in April 1707, I think that they would have acted in breach of treaty.

Then, some may say " If there was a valid international Treaty in 1707, have its provisions not been violated? Can redress be sought in the International Court of Justice at The Hague "? The answer I am convinced is "*No.*" (I shall, however, later expand on my submission that the Union Agreement cannot lawfully be abrogated by ordinary Act of the British Parliament). The reason why the Treaty of 1707 cannot be cognosced by the International Court of Justice is that, paradoxically, the Law of Nations is concerned—not with nations—but with States. The Scottish nation and the English nation may survive to this day, but the States—the kingdoms of Scotland and England—ceased to exist on May 1, 1707, when they merged their identity in the new State of Great Britain. I would with respect adopt the words of Lord Normand, when he gave the Presidential address to the International Law Association in Edinburgh in 1954. He observed of the Union[14] " Scotland made, for the sake of the better future of the island as a whole, a complete sacrifice of her national sovereignty to the new-formed Kingdom of Great Britain. England, no doubt, necessarily made the same sacrifice, though English historians are curiously reluctant to claim that honour for their country. But the sacrifice made by the smaller country in merging her sovereignty in a new entity was considerably more hurtful to her pride and to her individuality as a nation than was the similar sacrifice of her more populous and richer partner. It was a sacrifice for the good of the whole, and it is perhaps arguable that a larger sacrifice was made than was necessary." Two international persons disappeared in 1707—the obligants under the treaty—and a new international person took their place. This new State, though as I believe bound in constitutional law by the conditions of its own creation, could not in public international law be bound by a treaty to which it was no party. The Treaty of Union became not only an " executed treaty " in May, 1707: by merger the very parties to it were no more. To quote Sir Hersch Lauterpacht's 8th edition of Oppenheim[15] " A state ceases to be an international person when it ceases to exist. Practical causes of extinction of states are: merger of one state with another . . . By voluntarily merging into another state, a state loses all its independence and becomes a mere part of another." The examples quoted are in the main cases where a smaller State accepts by treaty—concluded through coercion or otherwise—incorporation into a larger State—as Mülhausen into France in 1798, Congo into Belgium in 1908, Korea into Japan in 1910, and so forth. Merger of two or more States to create a new international person is, however, not unknown. In the Indian Reports of 1955 one finds a very recent example of the effect on treaty rights of the merger of states into a new state.[16] In 1948 the rulers of a number of states entered into a covenant agreeing to integrate their territories into a new state, Pepsu, and to make over the administration of their respective states to the government of the new state. The court, in dismissing a claim by a private litigant based on the covenant observed, " It (the covenant) embodies the terms upon which the rulers agreed and decided to federate and bring into existence a new international persona. This is one of the circumstances under which a state personality breaks or ceases to exist and the results in such a case are not materially different from those which flow when a sovereign state cedes to or is subjugated by another sovereign state." [17]

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[13] Circumstances in which ratification is not essential to give binding force to a treaty are considered by Lauterpacht—Art. 6 of the Draft Law of Treaties proposed to the International Law Commission (U.N. Document A/CN/4/63, March 24, 1953).

[14] 1954 S.L.T.(News) 153 at p. 155.

[15] " Peace " at 155-156.

The Scottish Commissioners in 1706 were certainly negotiating under pressure of economic and political conditions, and possibly in the background also under the implied threat, if negotiations failed, of invasion by one of the great captains of history at the head of a veteran army, backed by the military resources of one of the most powerful States in Europe. (Duress of this kind could not, of course, as some laymen have implied, affect the validity of an international treaty. Many treaties have been concluded after actual military conquest of one party by the other). Some credit is due to the Scottish Commissioners for their positive achievement, but the form of treaty they negotiated is significant. The first three Articles of Union secure the incorporating Union of Scotland and England *de jure* on equal terms—while the rest of the Articles and the ancillary Scottish legislation are not unlike the terms upon which one existing state accepts incorporation in another. They are safeguards demanded by Scotland and conceded by England. England, as by far the stronger State *de facto*, needed no safeguards *de jure* for the English interests in the new State of Great Britain. The possibility that causes in the Queen's Bench, Common Pleas or Exchequer would be cognosced in the Parliament House was too fantastic to contemplate. *De jure*, the Union of 1707 was clearly not a cession of Scotland to England, and this fact can scarcely be over emphasised; but the very fact that the greater part of the terms of Union were in favour of Scotland may have obscured the true nature of the Union even from the greatest English constitutional lawyers such as Dicey. For them *the* Act of Union and the basis of the British Constitution is the pre-Union Act of the English Parliament 6 Anne c. 11—which, except as a counterpart of an international treaty or as a fundamental constituent document read with the equivalent Scottish Acts, could have no force or effect outside England.

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[16] *D. D. Cement Co.* v. *Commissioner of Income Tax*, All India Rep., 1955, Pepsu 3.

[17] *Ibid.* at p. 12. The court, however, conceded that an inter-State agreement setting up a new State may have the force of constituent or fundamental law.

The main significance in public international law of the Treaty of Union as a treaty *jure gentium* was that on May 1, 1707, a new State came into being in Europe. Yet, as relations between States normally involve legal issues, such as the extent of territorial waters, prize jurisdiction, citizenship, extradition and the like, the retention in Great Britain of two theoretically equal and independent legal systems has necessarily created problems. The internal constitutional organisation of Great Britain left Scotland and England as quasi-foreign States in questions of private international law and in some matters relating to Britain's external relations. I shall postpone for the present consideration of these questions.

Meanwhile, I would deal briefly with certain arguments on the Treaty of Union which have been advanced unsuccessfully in the High Court of Justiciary in the quite recent past. I refer to the appeals, brought on stated case, by Mr. Douglas Young and by Mr. Leonard.

CONSTITUTIONAL CONSEQUENCES OF UNION

The expression "Treaty" of Union has been used somewhat ambiguously at times even in the Scottish courts, and, so far as I know, no clear distinction has been drawn between the effect of the terms of the Union as an international treaty and the effect of the terms of the Union as fundamental *constitutional* provisions. I have been guilty of the same ambiguity myself at times, as have not a few lawyers and laymen. Failure to distinguish between the treaty as such and the constitutional consequences of the Union led Mr. Young and Mr. Leonard into difficulties in their appeals against conviction for failure to comply with provisions of the National Service (Armed Forces) Act, 1939, and of Defence Regulations. In 1942[18] Mr. Young argued, *inter alia*, that all Acts of the Imperial Parliament since 1707 were void and of no effect, since the consequence of a material breach of treaty is to rescind the whole treaty. Leaving aside for the present the question whether the terms of the Union had in fact been infringed in this particular case, the argument based on breach of treaty was impossible. As I have explained already, the Treaty as an obligation *jure gentium* subsisted only until May 1, 1707, when by merger the parties to the treaty ceased to exist, Thereafter the doctrines of international law relative to executory treaties ceased to be relevant. The views of the Lord Justice General (Lord Normand) on that point cannot be challenged. On September 22, 1942, the same reasoning was followed in *Leonard* v. *Patterson,*[19] and on October 6, 1944[20] the Lord Justice-Clerk (Lord Cooper) dismissed a second appeal by Mr. Young, on the assumption that the appellant relied upon the same arguments as had been considered before. Had the case been argued on the basis that the terms of Union were constituent, Mr. Young's case would perhaps have been stronger, but an argument based on Article XVIII could not, in my view, have succeeded in this case. True the Article forbids legislation regarding private right which is not " for evident utility of the subjects within Scotland." The matter *sub judice*, however, mobilisation of the nation for war, seems to fall clearly into the category of public right regarding which no special limitation is expressed.[21]

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[18] *Young* v. *Adair*, H.C.J., July 9, 1942 (unreported). For Mr. Young's argument see *The Free Minded Scot*, Glasgow, 1942.

Having reached the conclusion that the terms of the Union between Scotland and England ceased to be a source of international obligation in May, 1707, I find myself, on the other hand, quite unable to accept the view of those English constitutional lawyers[22] who hold that the terms of Union have no more force than an ordinary Act of Parliament. The pre-Union Scottish and English Acts had, of course, legislative force within the respective jurisdictions of the two kingdoms—as, for example, when repealing legislation inconsistent with the Union; but as mere legislative measures they could not, independently of each other, have had the effect of regulating the British Constitution which affects interests transcending the particular limits of the former kingdoms. In short I consider that the terms of Union (in their final form) as eventually agreed between England and Scotland, though set out in statute form, are in fact fundamental law—and have the force of a constituent document. Every schoolboy knows that the British Constitution has no fundamental written basis; but in my view every schoolboy has been misinformed. I have reached this view after much anxious thought and research; but considerations of space compel me to state this view very briefly.

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[19] H.C.J. (unreported).

[20] H.C.J. (unreported); but see *An Appeal to Scots Honour*, by Douglas Young, Glasgow, 1944. This pamphlet contains the argument which Mr. Young had intended to submit.

[21] Bankton I.1.54; Erskine I.1.29. Contrast the relevant clause of Article XVIII with Just. Inst. I.1.4.

[22] *e.g.*, Dicey, *Law of the Constitution*, 9th ed., 39–40, 88–91.

The fallacy of regarding the terms of Union as mere legislation is largely, I think, due first to regarding the pre-Union English Act 6 Anne c. 11 as *the* Act of Union,[23] and thus overlooking the fact that, as a mere legislative Act, it could and can have no effect outside England. It is not a United Kingdom statute, and strictly the Scottish courts could not notice it judicially as an Act of Parliament. Secondly, it has been assumed without justification that the British Parliament is the English Parliament with Scottish members admitted; and that its powers are those of the former English Parliament. To quote Lord President Cooper in *MacCormick* v. *Lord Advocate*[24] "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his *Law of the Constitution.* Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions." In fact the British Parliament is the creation of the terms of Union—by what was in effect a revolution by consent.[25]

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[23] Blackstone, Dicey, Anson, Wade, Jennings, Hood Phillips, Gough and many other eminent English writers apparently take this view. It is more difficult to explain why some Scottish lawyers *per incuriam* have followed blindly, *e.g., Laughland* v. *Wansborough Paper Co.*, 1921 S.L.T. 341; *Walker's Trs.* v. *Lord Advocate,* 1912 S.C.(H.L.) 12.

[24] 1953 S.C. 396 at p. 411. Dicey and Rait assume without argument or explanation that, notwithstanding the express terms of the Union, its effect was to extend to Scotland the doctrine of parliamentary sovereignty. "The extension to Scotland of the supreme authority of Parliament is not recorded by a single word in the Act (*sic*) of Union. It may well be doubted whether, either in England or in Scotland, it was clearly realised or perceived. . . . The transference in Scotland from a non-sovereign to a sovereign Parliament is one of those changes which, just because it was not expressed in any legal contract, deserves the more attention": *Thoughts on the Scottish Union*, 242–243.

The Parliament which met after the Union was expressly styled the first Parliament of Great Britain, and—questions of internal procedure apart—it had no legal continuity from the former English Parliament.[26] The makers of the Union regarded the agreed terms as including matters of fundamental law.[27] On the whole, by convention of the constitution at least, or, as I would suggest by the *law* of the constitution, the indisputably fundamental terms have been treated as unalterable by Act of Parliament. I do not think that the constituent Acts declaring the Union constitution have in practice been treated as of no greater sanctity than ordinary legislative Acts. It must be remembered, however, that Article XVIII gave wide powers to the New Parliament of Great Britain to alter the laws of Scotland after the Union. Other Articles provided expressly for Parliament to alter in stated circumstances the position confirmed by the Union, and it is at least arguable that a like power is conferred by implication in certain other cases. Parliament hesitated long before venturing to repeal expressly even those parts of the Union agreement which were clearly spent.[28] The alleged early violations of the terms of Union—such as the Treason Act, 1708, the Toleration Act, the Patronage Act and the Malt Tax [29] might be reconciled with the letter if not with the spirit of the Union; and the same may be said of some later legislation. Measures politically in conflict with the spirit of the Union agreement may, nevertheless, be legally unassailable.

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[25] Professor J. D. B. Mitchell has warned me ([1956] *Public Law* 295) that it is not very helpful to construe the Union of 1707 from the viewpoint of transfer of powers; and that it is better to regard the Union as a revolution establishing a new constitution. This new constitution, however, itself contained express limitations on the powers of Parliament.

[26] The fact that in law a new Parliament had superseded the former Parliaments of Scotland and England was, of course, more evident to Scottish members than to those sitting for English constituencies. Members of the former English Parliament by Anne's Proclamation of April 29, 1707, had been appointed " Members of the first Parliament of Great Britain . . . for and on behalf of England." Article III clearly contemplates a new Parliament, as does Article XXII prescribing the Oaths and Declarations required of all members of both Houses of the new Parliament. By 6 Anne, c. 41, ss. 29–30, the disqualifications applicable to Members of the former English House of Commons were made applicable *ob majorem cautelam* to persons elected to the British House of Commons, a measure justifiable only on the assumption that this was a new institution. Though the Septennial Act, 1715, refers to the pre-Union Triennial Act, 1694, as still in force, this Act can be regarded as having been extended to the Parliament of Great Britain by Article XXII and by 6 Anne, c. 41, s. 7 (which is worded somewhat ambiguously). The fact that the internal organisation and procedure of Parliament is based on pre-Union English practice (see, *e.g.*, Hatsell, 1818, ed. 2, 7 and 8; also *Hansard*, vol. 410, col. 34, April 17, 1945) cannot justify the assumption that its legislative powers extend beyond those conferred by the constituent agreement of 1707.

[27] This is even accepted by Dicey, *Law of the Constitution*, 65; *Thoughts on the Scottish Union*, 257. J. W. Gough, while acknowledging that both parties to the Union intended certain conditions to be essential and permanent, concludes " . . . that such phraseology, however well intended at the time, or even necessary to satisfy jealous interests, was legally only a pious fraud ": *Fundamental Law in English History* (1955) 179–180. This cynical view is apparently based on the assumption that the Union rests on an Act of the English Parliament. Shortly after the Union, on the debate for its dissolution in 1713, Nottingham declined to admit that Parliament was absolutely sovereign, for, " while he knew not anything but what Parliament could do," he excepted " destroying the present constitution, which he owned they had no power to do." (It is curious to note, however, that he thought that the Union could be dissolved by legislation—which would seem to be the most obvious example of destroying the constitution.)

An apparent example of legislation conflicting with the fundamental law is the "repeal" [30] of the requirement that professors and principals of Scottish Universities should declare their adherence to the Presbyterian form of Church government in Scotland. This in my view—since no provision was made at the time of the Union for varying fundamental provisions—might be regarded *pro tanto* as a revolution by consent. It does not follow that all other purported repeals of terms of the Union would be so generally accepted. To the argument that, since Parliament has apparently passed legislation in violation of the basic terms of the Union, therefore these terms cannot be fundamental law, Sheriff K. W. B. Middleton provides the clearest answer—"The fact that Parliament has done something cannot prove that it was entitled to do it." [31] There is admittedly the difficulty that the founders of the Union made no provision for constitutional amendment of the fundamental provisions. Reflecting on the political upheavals of the seventeenth century, and anticipating the difficulties which would arise on Anne's death, those who framed the Union could not have considered that they were framing a constitution which would last till Doomsday. They might have regarded their labours as well rewarded if they had thought that it would last for fifty years substantially as they had framed it.

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[28] Express repeal of certain obsolete or superseded provisions of the English Act 6 Anne, c. 11, was first ventured by the Statute Law Revision Act, 1867; but the equivalent Scottish Act was not pruned until forty years later—Statute Law Revision (Scotland) Act, 1906. See also Statute Law Revision Act, 1948, for discrepancies between variation of English and Scottish repeals. Of the original Articles incorporated in the Union agreement, the following have been expressly superseded: V, VIII, X–XV, XVII; the following Articles have been expressly superseded in part: VI, VII, XVI, XIX–XXII and XXIII. Articles XX (retaining the Heritable Jurisdictions) and XXI (confirming the privileges of the Royal Burghs), though not expressly repealed are largely spent. It may be that the variation of Article VI stretched Parliament's powers in relation to private rights: see *Duke of Queensberry* v. *Officers of State*, F.C., Dec. 15, 1807.

[29] 7 Anne, c. 21; 10 Anne, c. 7; 10 Anne, c. 12; 12 Anne, c. 2. The Toleration Act did not derogate from the recognition of the Church of Scotland as the established Church. The Act for Securing the Protestant Religion (which formed part of the Union agreement) referred to the Act 1690, c. 5, but not to c. 23, which had dealt separately with patronage. The Malt Tax measure was not to become effective until peace had actually been concluded with France.

[30] By the Universities (Scotland) Acts, 1853 and 1932; see also Statute Law Revision Act, 1948.

[31] "New Thoughts on the Union" (1954) 66 Jur.R. 37 at p. 49.

As Lord Cooper pointed out in *MacCormick's Case*,[32] the terms of Union are on three levels regarding modification. Some, Parliament was expressly authorised to modify; some were stated to be fundamental and unalterable; and some were neither made fundamental nor expressly made alterable. Terms in the first category caused no difficulty. As for the fundamental provisions, on no canon of construction can Parliament be regarded as empowered to alter them. If they were ever to be altered, those who made the Union would, I think, have considered that a fresh constituent measure would be necessary—possibly negotiated by Commissioners. The one method which they would have rejected emphatically would have been modification by ordinary Act of Parliament where no equality could have been secured for consideration of Scottish interests.[33] Even today I consider that the entrenched provisions could only be superseded by revolution—in the sense of a fundamental reconstruction of the British Constitution. The remaining terms of the Union are neither declared to be fundamental nor expressly stated to be subject to amendment by Parliament. Some of these, *e.g.*, the economic provisions of Articles X—XIV, were of mere transitional importance and obviously not intended to have any permanency at all. Others, like those protecting the heritable jurisdictions and the royal burghs (XX and XXI) are more difficult. The mere fact that certain rights were to remain, " notwithstanding the Union," does not necessarily compel the construction that they were made immutable by Parliament for all time. The question is still open, but I suggest that provisions in this category could be construed separately and in the context of the Union agreement as a whole to ascertain whether they are impliedly entrenched or not.

JURISDICTION OF COURTS WHERE ACT VIOLATES TERMS OF THE UNION

The question then arises—are the restrictions on Parliament mere *leges imperfectae* or have the courts jurisdiction to refuse effect to an Act of Parliament which clearly violates the fundamental terms of the Union? No such power was conferred on the courts at the Union. The existing privileges of the courts in Scotland in 1707 were confirmed—but these certainly did not include scrutiny of the legislation of the Scottish Estates. So far as the Court of Session is concerned, there is the further difficulty that an appeal lies to the House of Lords—which is in theory Parliament exercising its judicial functions. At the time of the Union these could be exercised by the whole body of peers—an active political body—and not as now by a small committee of very experienced judges. Possibly for that very reason there have been no early cases [34] and few occasions in all when the courts have been asked to consider the validity of legislation allegedly in conflict with the fundamental conditions of the Union. Another reason, of course, is that, in matters of public right, a private litigant could seldom have title to sue.[34a]

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[32] Cited note 24, *supra*.

[33] One may note that there have been even less safeguards for these interests since 1832 than in 1707. The Reform Acts have destroyed the old Scottish system of election law, which, with all its faults, did at least ensure that the candidate and the electors in a constituency had the same local qualifications. Today, though a residence qualification is required of the electorate, Members of Parliament need have no connection whatever with their constituencies.

On the other hand, the fundamental constitution which confirmed the privileges of the Scottish courts also limited the powers of the Parliament which it created; and imposed the only express intrinsic restrictions on its sovereignty.[35] The judicial oath binds our judges to do right " after the laws and usages of this realm." If I am right that the terms of Union are constituent, then Parliament can only legislate lawfully within the powers conferred upon it; and the Judiciary would be bound by their oath to pay regard to the fundamental law in preference to a mere Act of Parliament. This would involve the Scottish courts in a somewhat unequal struggle with Parliament, and this could be justified only on very serious matters. In my opinion, only where really important issues are involved—such as those affecting the Church and jurisdiction of the Supreme Courts—should judges by virtue of their judicial oath be expected to assume jurisdiction to refuse effect to legislation in apparent conflict with the fundamental terms of the Union, but in general they would be prepared to construe legislation so as to reconcile it, if possible, with the limits set in 1707. The dicta in the recent *MacCormick Case* [36] do not stand alone. In that case the Lord Advocate conceded, and the court asserted, that Parliament cannot lawfully repeal or alter the fundamental conditions of the Union. In

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[34] The attitude of the House of Lords in *Greenshield's Case* (1710–1711), Robertson's App. 12, was calculated to discourage any appeal to that court on grounds that the terms of Union had been violated. See also *Magistrates of Elgin* v. *Ministers of Elgin, ibid.* 69; Gibb, *Law from over the Border,* 7 *et seq.*

[34a] Because of lack of patrimonial interest. This proved fatal in *MacCormick's Case.* The Lord Advocate, who could assert the public interest, would not be likely to challenge measures favoured by the Government of which he was a member.

[35] The limitations written into the constituent document by which Parliament was set up must be distinguished from alleged extrinsic limitations on Parliament's powers —such as rules of international law. It was these extrinsic limitations which Lord Dunedin was considering in *Mortensen* v. *Peters* (1906) 5 Adam 121; 8 F.(J.) 93; *cf.* Middleton, *cit.* note 31 at p. 39.

[36] 1953 S.C. 396; see also quotation from Lord President Cooper's opinion, p. 110, *supra.*

Minister of Prestonkirk v. *Earl of Wemyss* [37] Lord Justice-Clerk Hope considered that, were Parliament to attempt repeal of fundamental provisions relating to the National Church, "resistance on the part of Scotland could hardly be termed rebellion. 'Our ancestors at the Union,' he observed, 'provided that the regulations applicable to our National Church should be absolutely irrevocable, and that the Parliament of Great Britain should have no power to alter or repeal those provisions'." Also in the *Auchterarder Case*,[38] where the terms of Union were pleaded but not pressed, the judges' opinions do not suggest that they would have upheld legislation purporting to destroy the national Church. In *Orr Ewing's Trs.*[39] a strong court presided over by Lord President Inglis was prepared—relying on the conditions of the Union—to decide according to our laws, notwithstanding the views which the House of Lords had already expressed in an English appeal and might express in a subsequent Scottish appeal. In 1921 in *Laughland* v. *Wansbrough Paper Co.*[40] the "evident utility" clause of Article XVIII was argued in the Outer House by four very eminent and experienced counsel, but on balance the Lord Ordinary found that general considerations of utility in fact favoured the view of the respondents. He observed, moreover, that individual cases of hardship are not inconsistent with general utility. I wish, however, to make my own view clear that the "evident utility" clause of Article XVIII (which should be compared with the penultimate sentence of Article XIV reposing confidence in the good faith and good sense of Parliament) should not be relied on to secure general judicial scrutiny of legislation.[41] It may be competent to rely on the clause in exceptional circumstances; but, if so, the onus would be on the challenger of a particular Act to prove clear general non-utility and that the issue was exclusively one of "private right." [42] I cannot further comment on what are primarily constitutional issues.

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[37] (1808) M. "Stipend," Appx. No. 6; 5 Paton 210; Session Papers must be consulted for the full version of the Lord Justice-Clerk's opinion. For the reasons stated the present writer cannot, however, accept the L.J.-C.'s view that Parliament's violation of its constitutional limitations would amount to dissolution of the Union.

[38] *Earl of Kinnoul* v. *Presbytery of Auchterarder* (1838) 16 D. 661.

[39] (1884) 11 R. 606.

[40] 1921, 1 S.L.T. 41. Counsel were Condie Sandeman K.C. and the future Lords Thankerton, Robertson and Fleming.

[41] Though, of course, the courts have the general duty to construe the terms of Union as well as those of Acts of Parliament: see, *e.g.*, Lord President Campbell's opinion in *Duke of Queensberry* v. *Officers of State*, F.C., Dec. 15, 1807.

[42] Professor Mitchell, reviewing the present writer's book (Vol. I, Part 2, in the British Commonwealth series), considers ((1956) 1 *Public Law* 296) that no reliance can be placed on the "general utility" clause, as Parliament must be the best judge of utility. But this criticism does not expressly consider the factors considered in note 33, *supra*; nor the situation where the majority party in Scotla is the minority party in England.

EFFECTS OF SEPARATE LEGAL SYSTEMS

To return to international questions—though a unitary State with one Queen and one Parliament, by the terms of Union Great Britain is still divided between two separate legal systems. The former kingdoms of Scotland and England are no more, but the separate nationhood of these former kingdoms is safeguarded in particular by their separate laws. This separation is not comparable to federal and State laws in a federal State. Neither Scottish nor English law is restricted in its competence within its own jurisdiction. In *Orr Ewing's Trustees*[43] a major conflict between Scottish courts and English courts seeking to exercise jurisdiction in Scotland, Lord President Inglis observed,[44] "The judicatories of Scotland and England are as independent of each other within their respective territories, as if they were the judicatories of two foreign states. I am anxious to formulate this rule, which is the necessary result of the Treaty of Union, with as much accuracy and precision as possible, because a loose and illogical statement of so important a constitutional doctrine is both dangerous and misleading."

Yet in Britain's external relations in particular there is a very marked tendency to treat English law as the general law of the land subject to the operation of local customs; and in consequence to ignore the legal autonomy of Scotland. An early example of this, following close upon the Union, is the Diplomatic Privileges Act, 1708—a British Act—which provides by section 4 for offenders to be brought before the Lord Chancellor, the Lord Keeper, the Chief Justice of Queen's Bench or Chief Justice of Common Pleas—which would make impossible the handling of offenders by the Scottish criminal courts. There has in fact, so far as I am aware, been no instance where an offender is alleged to have committed the prohibited acts in Scotland. It is not, therefore, clear whether an accused could lawfully be removed from the jurisdiction of the Scottish courts in accordance with the provisions of the Act if the charge against him related to his conduct in Scotland.

Last year Lord McNair published his important three volume work on public international law as expounded in the opinions of the English Law Officers. He explains that he has not had opportunity to include the opinions of the Scottish Law Officers in this field. Such investigations as I have made incline me to the view that, so far as post-Union developments are concerned, in confining his researches to England, his Lordship has not omitted very much of importance. Generally speaking, the Attorney-General for England has assumed unofficially the functions of a British law officer. On some occasions

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[43] *Sup. cit.*

[44] At p. 629.

Scottish interests have been consulted—as in the controversy focused on trawling in the Moray Firth.[45] In this connection it may be recalled that pre-Union Scottish views on the control which could lawfully be exercised by a State over territorial waters and over fishing in the seas off its shores differed from English theory.[46] In matters of prize, the fact that Scottish courts had equal jurisdiction with English courts was clearly unacceptable in England after the Union, and in due course the English court was given exclusive jurisdiction. Thus in *Hendricks* v. *Cunningham*[47] Lord Mansfield advised the House of Lords that the Admiralty Court of Scotland had no jurisdiction to try a question of prize arising out of capture of a vessel brought to Port Glasgow by a Scottish privateer, commissioned to make reprisals. " The captors, instead of resorting to the Admiralty of England to bring the proper process, chose to commence a civil action in the Admiralty of Scotland." In 1825 the prize jurisdiction of the Scottish Admiralty Court was expressly transferred to the English Admiralty Court,[48] and the Royal Commission on Scottish Affairs declined to discuss the suggestion made in evidence by the Faculty of Advocates in 1953 that jurisdiction in prize should be re-established in Scotland—which in the recent war was a vital centre for sea and air warfare.

Another problem relates to fugitive offenders from other jurisdictions. By the Extradition Acts, 1870–1906, certain offences to be construed according to the law of England or of a " British possession " are regarded as " extradition crimes," and the appropriate forum, except where the health of the accused is in jeopardy, is before the Metropolitan Magistrate at Bow Street in London. The question then arises—what if the accused is in Scotland, and his acts, though punishable under English criminal law and by the law of the country seeking extradition, are not punishable by Scottish law? At Christmas 1956 a case in point seems to have been dealt with, unfortunately without argument on the relevance of Scottish law. In Scotland it is no crime for young people over the age of 16 to marry without parental consent—though this may be regarded as abduction (an extradition crime) in English law and in certain foreign States. Yet on such an allegation a young German, Blierbach (aged 29), was arrested in Scotland.[49] He was then carried out of the jurisdiction to Bow Street with a view to surrender in respect of abduction of a girl of 18—their purpose being marriage. It may be thought that the alleged offender was entitled to plead that his acts were not criminal

[45] See *Mortensen* v. *Peters, sup. cit.*

[46] Fulton, *Sovereignty of the Seas*, Part II, Chap. 1, and esp. at p. 548.

[47] (1783) 2 Paton 609.

[48] By 6 Geo. 4, c. 120, s. 57.

[49] *Scotsman*, Dec. 25, 1956.

by the law of the country where he had found refuge. Certainly extradition cannot be granted except within the scope of the Extradition Acts which apply the norms of English law, but it is difficult to appreciate what justification there can be, within the terms of the Union, for surrendering a man from Scotland if his acts were not criminal according to the laws of Scotland as well as by those of English law. It is somewhat anomalous that, though jurisdiction regarding fugitive foreign offenders is committed to a Metropolitan Magistrate at Bow Street, if the alleged offender has come to Scotland from some part of Her Majesty's Dominions, by the Fugitive Offenders Act, 1881, s. 30, jurisdiction to commit may be exercised by a sheriff or sheriff-substitute of the County of Edinburgh. The distinction between " foreign cases " and " British Dominion cases " is difficult to justify in principle, and indeed the solution of the Fugitive Offenders Act seems by far the more reasonable.

NATIONALITY

In conclusion I shall mention a striking recent illustration of the proposition that in international questions claims are unjustifiably made to assert the law of England as the law of Great Britain—*Attorney-General* v. *Prince Ernest of Hanover*.[50] Prior to the Union of 1707 various Scottish and English statutes had conferred the Scottish or English nationality upon certain groups of foreigners. Thus in Scotland Frenchmen were entitled to the privileges of naturalisation in Scotland by the Act 1558, c. 65. The Acts of 1661, c. 39 and 40; 1669, c. 7 and 1681, c. 12 offered Scottish nationality to foreign fishers and to those who should set up manufactories in Scotland. By the Act of 1695, c. 88, which established the Bank of Scotland, naturalisation in Scotland was offered to those who should take shares in the Bank. The English Act of 1705, 4 & 5 Anne c. 16, to encourage the descendants of the Electress Sophia of Hanover to study the laws and customs of England, granted them English citizenship. After the Union, Scottish writers [51] accepted that the pre-Union Scottish Acts could not be relied on to support claims to British citizenship after 1707. They regarded these Acts as repealed by the Acts of Union as being inconsistent with the Union, and further, because after the new State of Great Britain had come into being it was impossible to acquire Scottish or English nationality. A pre-Union English or Scottish Act could not take effect outside England or Scotland after 1707—unless extended by legislation of the British Parliament. It was apparent, moreover, that England would not have accepted the Union at all on the basis that, while she was in constant conflict with France, Frenchmen should be entitled to the privileges of British nationality by virtue of the Scottish Act of 1558, or by purchasing a share in the Bank of Scotland, or by setting up a manufactory in Scotland. Had these Scottish writers considered the matter, they would no doubt not have considered a study of the English laws as constituting an adequate ground for granting Germans the privileges of citizenship in Scotland. The views of the Scottish writers were reinforced by a majority decision of the whole Court of Session and the unanimous decision of the House of Lords in 1820 and 1822—*Macao* v. *Officers of State*.[52] In that case it was held that though desuetude did not repeal the part of the Act constituting the Bank of Scotland which conferred the privileges of naturalisation, that Act had become spent on the Union of Scotland and England in 1707. Both the Scottish and English Acts of Union had provided for the repeal of laws inconsistent with the Union, and the judges, after consulting the interests of England and English law, were clear that no pre-Union Act could be relied on after 1707 to give British nationality. That could only be done by Act of the United Kingdom Parliament.

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[50] [1957] 2 W.L.R. 1; and see 1956 S.L.T.(News) 89 and 1957 S.L.T.(News) 22. It may also be noted that unsuccessful attempts were made to have Scottish doctrines incorporated in the Army and Air Force Acts, 1955, so as to create a code of *British* Military and Air Force law. The Homicide Act, 1957, however, accepted the Scottish doctrine of " diminished responsibility " which had previously been rejected for the Service Codes. See especially Sir Patrick Spens' contribution on November 28, 1956, to discussion of the Homicide Bill. See also Smith, *Development of the Laws and Constitution of the United Kingdom* (Scotland), pp. 665–666, and *The Times*, November 27, 1954.

[51] References collected 1956 S.L.T.(News) 89.

When, however, the equivalent situation arose for consideration by the English Courts, a very different result was reached, and in 1956 Prince Ernest Augustus of Hanover was declared to be a " British subject " by virtue of the Act of 1705 which, to encourage the study of the English law and constitution, conferred the privileges of English nationality on descendants of the Electress Sophia of Hanover. The effect of the Union was not argued at all, and counsel on either side accepted that " English " nationality in 1705 was the same as " British nationality " in 1955. When the decision in favour of the Prince was taken on appeal to the House of Lords, counsel were asked to argue the effect of the Union on the 1705 Act, but the Attorney-General for England declined to take the point (stating that there was a " complete answer " to it—though what this might be was not explained to their Lordships). Counsel for the Prince submitted that he was not obliged to deal with a contention that had not been taken against him by his opponent. The result is in consequence most unsatisfactory in that on a construction of the meaning of the Act 4 & 5 Anne c. 16, the Prince was declared by the House of Lords (sitting as the court of ultimate resort in England) to be a British subject, but at least three of their Lordships expressly reserved their opinions as to what the legal position might be if in a future case the effect of the Act of Union were argued. Viscount Simonds observed:[53] " Finally I must refer to a question which has caused me some embarrassment. It is natural that this case, with its striking and unusual features, should arouse much public interest, and it happens that in the consequent discussion of it a point has been taken which was not debated in the courts below. It is that, whatever might have been the result if the question remained as it was before the union of England and Scotland, an Act of the English Parliament passed in the year 1705 could not be effective to confer the status of a British subject upon a person born on foreign soil after the Act of Union. This point . . . I thought it right to bring to the notice of the Attorney-General and of counsel for the respondent. The Attorney-General, having considered the point, came to the conclusion that it was not a good one. He briefly explained his reasons, and, in effect, declined, as he was well entitled to do, to press it on your Lordships. In those circumstances it was clearly not possible to pursue the matter further and counsel for the respondent was not invited to deal with it. There it must rest. The House makes no pronouncement upon it." The scope of the actual decision in Prince Ernest's case is controversial. It is an English authority proceeding largely on a concession by an English law officer. " British " interests were not, and in a sense could not be, represented unless, possibly, the Lord Advocate had been called in a concurrent Scottish action of declarator. Only in the House of Lords did judges with knowledge of the laws of Scotland even notice the Union point; and, of course, the House might well have sat without a Lord of Appeal familiar with any law but English law. Theoretically, it might still be open to the House of Lords, sitting as a Scottish appellate court, to declare that Prince Ernest is not a British subject in view of the Union. The Act of 1705 has, of course, never been extended to Scotland, and may well have been repealed *quoad* England by the Articles of Union—by Article XXV in particular.

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[52] November 14, 1820, F.C.; (1822) 1 Sh.App.; and see also Session Papers in the Advocates' Library.

It would be a curious situation in international and constitutional law if one part of a unitary State recognised a group of individuals as naturalised and another part of the same State did not. Section 31 (1) of the English Criminal Justice Act, 1948, provides for the punishment by the English courts of " any British subject " employed under Her Majesty's Government who in a foreign country when acting in the course of his employment does acts or makes omissions which, if done in England, would constitute an offence by English law. Section 29 (1) of the Criminal Justice (Scotland) Act, 1949, has a similarly worded provision giving the Scottish courts jurisdiction to try such British subjects for acts committed abroad, if such acts if done in Scotland would have been punishable by Scottish law. It would be interesting to know what policy determines whether such "British subject" should be tried in Scotland and England. The point might arise as to whether a person in the position of Prince Ernest of Hanover could still, if tried under the Scottish Act, contend that he was not a British subject by the laws of Scotland—having a different status in the jurisdiction of the Scottish courts from that which he has in England (an analogy would be the "limping marriage"). This would be a striking illustration of the proposition that, though politically united, Scotland and England, by retaining their severalty in the administration of justice at all levels, still, where conflict of jurisdiction and laws arises, can produce problems which are of international rather than constitutional law. The judicatures of England and Scotland are to each other as those of foreign States. Certain lawyers tend to regard the English system as the law of Great Britain, while Scots law is considered by them to have the status of local law applicable only to Scottish domestic affairs. This is not what was agreed at the Union.

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[53] At p. 10.

If I seem to have viewed the legal implication of the Union primarily from a Scotsman's viewpoint, that may be explained by the very nature of the Union agreement—which combined provisions for an incorporating Union with safeguards for Scottish interests which would otherwise have been in jeopardy. England, being *de facto* by far the wealthier and more powerful partner, needed no safeguards once her northern frontier was permanently guaranteed against the danger of a hostile ruler and government. It is true that the spirit and at times the letter of the terms of Union have been breached, in the latter case sometimes with the concurrence or acquiescence of Scotsmen generally. On the whole, however, the fundamental law has stood firm. Even where its spirit has been violated, perhaps it may be salutary for Scotsmen to remember the beam in their own eye and the sad history of Orkney and Shetland under Scottish rule.

CONTROL OF NATIONALISED INDUSTRIES

LUCIEN FOLDES

INTRODUCTION

THE main Nationalisation Statutes enacted since the war give very little guidance as to the commercial and financial aims which the Public Corporations should pursue. In particular, they lay down no rules for determining the " right " levels of investment, output, prices and costs which could take the place occupied in private undertakings by the criterion of profitability. It is the purpose of this essay to argue that there is a need for such rules, to suggest some principles upon which they might be based, and to show how they might form the basis of a scheme for improving parliamentary control of the nationalised industries while avoiding undue interference in the details of their commercial operations.

The scope of the present rules may be illustrated from the Coal Nationalisation Act. The main provisions which are relevant (it is not proposed to present a complete survey) are these: section 1 (1) charges the Coal Board with the duties of " . . . (b) securing the efficient development of the coal-mining industry; and (c) making supplies of coal available, of such qualities and sizes, in such quantities and at such prices, *as may seem to them best calculated to further the public interest in all respects*, including the avoidance of any undue or unreasonable preference or advantage." Section 1 (4) lays down the " break-even rule," that " the revenues of the Board shall not be less than sufficient for meeting all their out-goings properly chargeable to revenue account . . . on an average of good and bad years." In the case of coal this rule need only be fulfilled consistently with the earlier provisions. Without undertaking a detailed critique, it is obvious that these rules are so vague and general that a very wide range of policies could be brought within their terms.

The italicised words above raise the crucial issue: whether the board of a nationalised industry is a suitable body to judge " the public interest in all respects." [1] I shall argue that it is not suitable, that such issues should be reserved to the Government (or to Parliament itself), and that the boards should be given standing orders of operation which, as far as possible, remove these issues from their discretion.

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[1] The statutes for gas, transport and electricity do not contain this wording. However, they do not preclude consideration of the general public interest, and there is evidence that the boards take it into account. See the reports of the Herbert Committee on the Electricity Supply Industry (Cmd. 9672/1956), paras. 364–373 and 429–431, and of the Chambers Committee on London Transport (Ministry of Transport, 1955), Ch. VII, especially para. 72.

The main reasons why the boards are not suitable judges of the public interest are these: first, being engaged in one industry, they have special interests; thus an electricity board is not a suitable judge of the public interest in rural electrification. Secondly, their members are not primarily selected as judges of the public interest, but for their competence in managing particular industries. Thirdly, the boards may lack both the information and the power necessary to ensure that their policies are co-ordinated with those pursued in other sectors of the economy; though the Government does admittedly exercise either official control or unofficial influence in cases where co-ordination is considered important. Fourthly, the boards are not fully accountable to Parliament. This lack of accountability is perhaps most serious in cases where their policies bring about substantial redistributions of real wealth and income among members of the community. For example, if rural electrification is carried out at a loss which is financed from profits made in urban areas, the economic effect is indistinguishable from that of paying a subsidy to electrical development in the one place and levying a tax upon it in the other.

It is therefore suggested that the discretion of the boards should be restricted by the enactment of principles of operation, which they would be required to follow unless exceptions were specially authorised by statute or ministerial order. It is most consonant with the character of the nationalised industries, and the general nature of our economic system, that such rules should be of a "commercial" character. That is to say, the rules would require that the policy of any board should reflect as closely as possible the conditions of commercial demand and cost confronting its industry. In particular, the boards would be authorised to supply on their own initiative only services whose costs buyers were expected to pay. The formulation of more precise principles along these lines will be attempted below.

It would, of course, be possible for ministers to impose restrictions upon the boards by using their powers of direction, but it seems preferable that the broad principles at least should be written into statutes. One reason is the importance of the principles involved, and the need to avoid frequent changes. The chief reason is that the enactment of commercial rules would provide a powerful means of improving parliamentary control, both by regulating the industries' conduct of their commercial operations and by making ministers responsible for any deviations from the rules which they authorised. Some of the problems of ministerial intervention and parliamentary control will be briefly discussed.

SUGGESTED RULES OF OPERATION

In this part, an attempt will be made to formulate some " commercial " criteria for the determination of prices, costs, investment and output which could, at least in part, take the place which the criterion of profitability occupies in private business. The discussion will be confined to a few principles which can be set out without using complex methods of economic analysis. Some important questions will be omitted (*e.g.*, problems concerning quality of service) as well as a number of complications which arise in attempting to draw up rules which could be applied in practice. No attempt has therefore been made to state the principles in a form in which they could be actually enacted or made the subject of regulations. Nevertheless, I believe that they could be put into such a form, and that it would be possible to write into statutes at least some broad rules based on the principles which will be suggested.

(a) Definitions

It will be convenient to begin with some definitions:

The *Opportunity Cost* of employing resources in any use is the return which they could have earned in the best alternative use. In cases where resources have yet to be acquired by an industry, their purchase price can generally be regarded as giving the best indication of the cost to society of employing them in that industry.[2] Where resources are already owned by the industry, the cost of using them is usually quite different from the original cost of acquiring them, though it is the original cost that gives rise to financial charges in the accounts. For instance, the " original cost " of the £400 million of the Transport Commission's own funds which are to be used for railway modernisation is about 3 per cent., the rate paid on the Transport Stock issued in 1948; but the cost of using the money now is surely the same, pound for pound, as that of the £800 million which the Commission intends to raise in the market at about 5 per cent. (Incidentally, no additional charge is to be found in the Modernisation Plan.) In the case of specialised assets the measurement of opportunity cost is quite intricate, but in particular cases it is usually possible to devise satisfactory approximations.

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[2] For certain reasons which have often been stated, market demands and prices of resources do not provide entirely satisfactory indications of social requirements and costs. Indeed it is, strictly speaking, never possible to measure the social requirements or costs of one product, or to determine its optimum output, unless conditions throughout the economy are taken into account at the same time. For this reason it is impossible to prove theoretically that the principles suggested in this section are the best conceivable, or that they lead to desirable results in all cases. However, it is important that there should be *some* set of rules which lays down normal commercial procedure and separates the sphere of authority of the boards from that of ministers. The rules suggested in the text have some basis in economic theory and should be capable of practical application. I should defend them along the lines indicated by Dr. I. M. D. Little in the Introduction to " The Price of Fuel." Some of the adjustments required where the rules yield unsatisfactory results in particular cases are briefly discussed in connection with ministerial intervention.

Discrimination occurs where a product is sold at different prices (1) for different purposes, *e.g.*, power and light, or (2) to different buyers, *e.g.*, domestic and industrial, where costs of supply are the same, or (3) for different units taken by the same buyer. The two-part tariff for gas or electricity, which charges each customer a fixed sum per period plus a price per unit, may discriminate in the second or the third way. If the fixed charge paid by a customer is not just enough to cover the cost of installations needed in order to serve his premises, this can be regarded as a difference between the price of the first unit supplied and the price of later units. One might also say that such a tariff discriminates among customers where the difference between installation cost and fixed charge varies from one customer to another. *Perfect discrimination* would be achieved by a pricing system which managed to extract the absolute maximum which buyers were willing to pay for a given supply of a commodity rather than go without. The concept of discrimination among the consumers of different goods gives rise to difficulties, and we shall not use it.

(*b*) *Pricing of a Given Volume of Sales*

If the general approach suggested in the previous section is accepted, it follows that any *given* volume of output which is to be sold during a period should be sold at a price which will just clear the market, *i.e.*, at which demand just equals the given supply. If lower prices are fixed, there will be queueing or rationing, which involve allocation according to a rule of equity, rather than by commercial criteria, and ought therefore to be undertaken only if special instructions are received. Moreover, the rules which will be suggested for the regulation of production according to demand and cost are difficult to apply if prices are not allowed to reflect demand. On the other hand, it is not suggested that prices should constantly fluctuate as slight changes occur in the market. Some degree of price stability is clearly warranted by commercial considerations where frequent changes lead to loss of goodwill and are very inconvenient and costly to administer.

(*c*) *Investment and Output in the Case of a New Product*

The next problem is to decide how much of each product or service should be made available. It will be convenient to begin with the following simplifying assumptions: (1) Only one product of given quality is under consideration, and its costs and revenues are independent of those of other products of the same industry. (2) It is a new product, which is to be produced exclusively with newly acquired assets. When old assets exist the problem is complicated, first by unexpected changes in conditions since they were acquired and, secondly, by the existence of financial charges due to the compensation paid when the assets were nationalised. (3) That conditions are expected to be constant during the life of the new assets, so that problems connected with price changes in short periods can be ignored.

Before making any suggestions it is worth while to describe briefly the policy which will be adopted by a (theoretical) private monopolist who seeks to maximise profit, but who has no power to discriminate. He will only produce at all if there is some output for which his revenue is expected to exceed his cost. Now each time he extends his output, his revenue will not rise by the full amount of the price of the additional quantity for, in order to sell more, he must lower the price of his *whole* output. On the other hand, if he is a large buyer of productive resources, the increase in his demand may raise the price he must pay for *all* his purchases, so that the addition to his cost will exceed the price of the resources needed to produce his additional output.[3] He will clearly extend production as long as the additions to revenue exceed the additions to cost. Now it is generally agreed that, although the resulting output gives him his greatest profit, it is likely to be smaller than is desirable. The loss to the monopolist due to the reduction in price represents no fall in consumers' satisfaction, but is due only to his inability to charge different prices for different units of output. Similarly, the rise in the price of resources which he was using already represents no rise in their alternative earnings. Therefore these factors ought not to be counted in the assessment of optimum output. This suggests that additional output should be produced so long as the price for which it can be sold exceeds the cost of the resources needed to produce the extra output. To put it in jargon, production should be extended as long as price exceeds marginal cost (the cost of one more unit of output), and should stop at the point where they are equal. This conclusion will have to be modified later on. The main difficulty is that the equation of price with the cost of an additional unit of output will lead to losses where the average cost of the whole output exceeds the additional cost.

Leaving aside for the moment the question of the size of output, the first problem is to determine the circumstances in which a nationalised industry should instal capacity for making a new product. A well-known suggestion is that capacity should be installed whenever the capital and running costs of the resulting output do not exceed the maximum revenue which consumers would be willing to pay rather than go without it, *i.e.*, the revenue which could be raised with perfect discrimination. However, it is not usually possible in practice to extract the maximum from buyers, so that this suggestion, if followed, would allow the production of some products at a loss.

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[3] In the rest of this part it will be assumed that the market prices of productive resources are given.

I shall argue, for two reasons, that capacity should not in general be provided unless *actual* revenue accruing during the life of the assets is expected to cover all costs. In the first place, it is difficult to check whether there is in fact enough demand for a service unless one insists on collection of the revenue. In an industry which is not run mainly for profit, there is a particularly great incentive to expand, and thereby to increase the power of those who run the industry and to increase the speed of promotion of staff. It is therefore essential to insist that each activity should pay its way, in order to ensure that it is not being run simply because it is some administrator's " pet project," or because a strong pressure group is " pushing " it. Secondly, if losses are made, they have generally to be financed by taxes on other products or activities, either within or outside the industry, or by inflationary borrowing. Both methods involve disadvantages in other sectors of the economy, at any rate in present conditions.

In some cases it is quite possible to collect enough revenue to cover costs, but some law or convention stands in the way of the adoption of the kind of tariff which would raise the necessary sum. For instance, a board may consider it inequitable to discriminate among users of a service, or to charge different rates for services which are superficially similar. A good example is the insistence on making a uniform charge per passenger mile in the London area. There must be many services which could pay their way if special charges were made, but are unprofitable with uniform charging, so that they either operate at a loss or are not provided at all. In the latter case the apparently equitable rule actually damages the people it is supposed to protect, since it prevents the supply of a service whose costs they would be willing to pay. As for the former possibility, reasons have already been given why the boards should not provide services at a loss unless they are specially directed to do so. Apart from such directions, the restrictions on charging should be removed and customers permitted to pay for the services which they require.

This discussion suggests that a rule should be laid down to the effect that capacity should be provided only if it is expected that enough revenue can *actually* be collected to cover all costs. This rule should apply, not only to the whole of the planned capacity, but also to any part of it. No project or part of a project should be included in the plan if the resulting increase in output adds more to cost than to revenue. The revenue which is relevant is, of course, that which is obtained by selling the output of the additional capacity, without making any deduction for the fall in the price of the remaining output.

When a part of the revenue is not raised by a direct charge per unit of output, but (say) by a fixed annual charge to consumers, it is not always easy to attribute the revenue to particular units of output. Now it is desirable to avoid extensions of capacity which consumers are not willing to pay for separately, but which could be subsidised from the proceeds of fixed charges representing part of the benefit which consumers get from other parts of the output. In the case of relatively small extensions to capacity, which are unlikely to add much to the amount which could be extracted from consumers by way of fixed charges, it is therefore best to insist that extensions should not be undertaken unless they can be paid for out of direct charges. In other words, the price (variable charge per unit) must cover the average cost of the output from the additional capacity.

This point brings us back to the suggestion mentioned earlier, that planned output should be extended until price equals the cost of an addition to output. The first problem which arises is whether the relevant increase in output is a single unit (a kilo-watt hour, or an extra passenger on a train), or the whole output of an addition to capacity (an extra power station, or a train). This rather technical question is discussed in the footnote, which some readers may prefer to omit.[4]

Subject to the explanations given in the footnote, the rule that planned output should be extended until price equals marginal cost can be accepted, as long as it does not conflict with the overriding rule that revenue must be expected to cover all costs. Now losses may occur, since the whole trend of costs may be downward as the investment programme expands, so that the cost of additional output, and hence price, is below the average cost of the whole output. This may happen where the investment programme includes some indivisible items with large capacities, such as an electricity grid, or the permanent way of a railway which, once installed, can be used at relatively low cost. Other economies of large scale may also contribute.

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[4] The problem arises because capacity must normally be extended in "lumps," whereas output can rise by a unit at a time. The result is that the cost of extra output fluctuates a good deal according to the extent to which capacity is used. The capital cost of a new "lump" of capacity may be high; the cost of producing successive units from it generally falls at first, and then rises until no further output can be obtained.

The additional cost of a single unit of output is not, in general, a very suitable standard by which to adjust output and prices. First, it varies greatly with quite small variations in output, and is therefore not a satisfactory basis for reasonably stable pricing. Secondly, the cost of a single unit of output—an extra passenger—may be very low when capacity is not fully used. The extension of output until price fell to this low level might leave the price well below the average cost of output from the last "lump" of capacity—the carriage, or the train—which is contrary to the rule stated above. It is therefore generally best to spread the cost of a suitable marginal "lump" of capacity over the whole output which is produced from it, and use this adjusted measure of marginal cost as the basis for fixing price and output.

An exception should probably be made in some cases. When capacity is fairly fully used, the cost of an additional unit of output may be consistently higher than the average cost of the whole last "lump" of output. In such a case it is, strictly speaking, better to stop expanding production where price equals the cost of an additional unit, since the extension of output until price falls to the level of this average cost involves the production of some units whose cost exceeds their price. This point becomes important where demand is consistently so great that production must be pushed to the limits of capacity, though not so great that capacity can be extended. (Alternatively, extension may be prevented by some external restraint.) In this case the cost of additional output from available capacity rises without limit, so that the requirement that price should equal marginal cost simply means that it should be fixed at a level which is just high enough to restrict demand to the available capacity.

In the case of the gas and electricity industries, it is usually possible to make up any deficiency of revenue which results from marginal cost pricing by levying a fixed annual charge on each consumer (in excess of the cost of special installations), or by some similar device. This solution is not perfect, since in practice the fixed charge is likely to cause the loss of some customers who would be willing to pay the cost of supplying them; nevertheless, it enables output to be extended until price equals marginal cost, and is probably the most satisfactory method of discrimination which is practically feasible. If the necessary revenue cannot be collected by this or some similar method, output must be restricted until price rises enough for costs to be covered.

In the case of railways, the application of our rules is rather more complex, because there is a " pyramid " of units of capacity, and marginal units can be added at each level of the pyramid: a marginal truck on each train, a marginal train in each service, a marginal service on each line. Our principles require that (up to a technical maximum) further trucks be added to a train as long as receipts from the extra freight (not counting any losses due to the need to reduce charges for other truckloads) exceeds the additional costs, provided that the train as a whole pays its way. A similar rule applies to the addition of a further train to a service, and so forth. Where capacity is fully used, it may be possible to extend activity at each level until price equals additional cost, without incurring any losses. Where capacity is not fully used, the cost of (say) an additional train may be well below the average cost per train of running a service. Now if reductions of charges which are required in order to obtain additional traffic have to be granted also to traffic which would pay higher charges, it will not be possible to extend the service until the revenue from the freight on an additional train just equals its cost, because this would lead to a loss on the service as a whole. This restriction of service can be avoided if it is possible to adopt discriminatory charges, which enable the lower rates to be confined to the additional traffic.

In the case of the coal industry, costs rise continually as poorer and poorer seams are mined, so that (apart from financial charges, which are discussed below), the costs of additional output are above average costs and the extension of output until price equals marginal costs should yield handsome surpluses on the continued working of the richer deposits. In such cases it would clearly be wasteful to extend production further until price was equal to average cost, for the cost of the additional output would exceed its value. Profits, unlike losses, are welcome enough, and it would seem better to tax them than to dissipate them by wasteful investment.

Conclusions

The main conclusions reached so far can be briefly summarised as follows:

(1) A given volume of output should be sold at a price just high enough to clear the market, subject to the need for such short-run stability of prices as can be justified by ordinary commercial considerations. (Section (*b*).)

(2) An investment programme should be undertaken only if sales proceeds are expected to cover all costs. Buyers should not be deprived of services whose costs they are willing to meet, simply because the revenue cannot be raised without the use of discriminatory or other apparently inequitable methods of charging.

(3) The same applies to any part of a programme for extending investment and output. Thus planned output should be extended until the price of additional output is equal to the additional cost, as long as the whole programme, and each major part of it, is expected to pay its way. Where the cost of additional output is below the average cost of the whole output, a single "flat rate" price equal to the former would lead to a loss. If discrimination is impossible, output must then be curtailed until price covers average cost. However, it is possible in some cases to avoid such contraction without incurring financial loss, either by levying a "fixed" annual charge on buyers or by granting price reductions on a part of the output which are not extended to the whole.

The discussion of this section has proceeded upon certain simplifying assumptions, which in a full treatment would all have to be relaxed. The next two sections deal with the problems raised by (1) unexpected change, and (2) the existence of financial charges due to the compensation paid to former owners, which have received little theoretical discussion. The other assumptions will, however, be retained, partly for lack of space to discuss them, partly for the sake of simplicity.

The fact that an industry produces several products does not by itself make any difference. The rules apply to each product individually. Complications are introduced where the costs or revenues of different products are closely interdependent, but they do not affect our main principles. Charging schemes which are broadly consistent with these principles have been proposed by some authors.[5] The whole problem of joint production will therefore be left on one side. The questions which arise when conditions are *expected* to fluctuate from period to period during the life of an asset—*e.g.*, from peak to off-peak periods—are in essence problems of joint production, and will likewise be ignored. The problem of the quality of service will also be left out, though little work has been published on the application of economic theory to this question. Finally it must be confessed that economic theory in its present state has hardly any guidance to offer as to the optimum expenditure on such items as research and advertising.

(*d*) *Unexpected Change*

The discussion of the previous section dealt mainly with *planned* capacity, output and prices, and it was assumed that conditions were expected to be constant over the life of the new assets. If expectations turn out to be correct, actual prices and output should clearly be fixed according to plan. This section deals with the adjustments to be made when conditions change unexpectedly and permanently after capacity has been installed. The case of a change in demand will be taken first.

The case of a rise in demand is simple. If price and output were previously fixed on the basis of marginal cost, the same basis can still be used. If demand has risen greatly, this may simply mean that in the short run prices have to be put up to a level which will just ration out available capacity. Where price and output were previously fixed on the basis of average cost, it may become possible to switch over to marginal cost. If the increase in demand is large enough to justify installing new capacity, it can be put in hand, and any profits which accrue in the meanwhile can be used to help finance the expansion.

The case of a fall in demand presents greater difficulty. If the fall in demand for a product is small, it may be possible to meet it by foregoing any profits previously earned on that product. Such profits may be due, first, to an excess of marginal cost (which would determine price) over average cost, secondly, to the inclusion of a provision for uncertainty in the original calculations of average cost.

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[5] See, for instance, I. M. D. Little, "The Price of Fuel," and G. J. Ponsonby, "Towards a New Railway Charges Policy," *Journal of the Institute of Transport*, Vol. 25, No. 12, September, 1954.

Now suppose that a fall in demand occurs which is too great to be dealt with in this way, though not so great that operating costs cannot be covered. There are now two main possibilities. First, it may be decided to "write off" a part of the book value of assets, in order to reduce the total charges which must be covered by revenue. The determination of the amount to be written off is to some extent arbitrary, though it is possible to state rules for determining the maximum write-off.[6] A write-off might be financed from reserves, or the transfer of debt charges to another part of the enterprise or to the Exchequer. Secondly, efforts might be made to recover additional revenue from the remaining buyers of the commodity whose demand has fallen, either by increasing the degree of discrimination in charging, or by raising prices towards the point of maximum monopoly profit. Now some rise in price may in any case be justified if running costs are higher at reduced levels of output, but beyond this point a rise in price could cause a large waste of available capacity. Its effect would be like that of imposing a tax on the product.

In fact, the problem is whether to make up the loss by taxing consumers of the commodity whose demand has fallen, or by taxing some other group, or by using reserves. In principle, this is a problem which should be put up to the Minister for decision and, if necessary, for legislative action. There are no set rules, but in general the best method would seem to be to write off asset values against accumulated profits or, failing that, to transfer a part of the industry's debt to the Exchequer. The other methods suffer from two disadvantages: they place the burden due to the error of judgment on particular groups, and they are inconsistent with the principles of operation which the industries would be using normally.

Of course nationalised industries should not be encouraged to make a habit of transferring their liabilities to the Exchequer, or even to seek continual ministerial intervention. For this reason it is important that the boards should have some power to write off asset values against reserves, at any rate to the extent of unused provisions for obsolescence from previous projects which have accumulated in their books. On the other hand, it is generally better to deal with a major fall in demand affecting a large section of an industry by reducing its capitalisation, than to allow continuing financial deficits to act as a drag on production which succeeds in covering its operating costs.

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[6] After the write-off, price must not be below (a) marginal operating cost; (b) a level which permits total revenue (including any fixed charges) to cover the avoidable cost of operating (including the part of depreciation due to the use of assets, but not the part due to the mere passage of time); (c) the level at which price would be if demand had been correctly foreseen and capacity determined accordingly. The maximum write-off is that which reduces price to the highest of these levels.

Finally, suppose that the fall in the demand for a product is so great that there is no output at which operating costs can be covered. In this case production must normally cease, and any unrealisable asset values must be written off. (There may be cases where ordinary commercial considerations justify the temporary continuation of production. For instance, it may be considered cheaper to employ miners in unremunerative pits for a while than to dismiss them and incur losses due to the resulting discontent among the remaining workers.)

The remaining categories of unexpected change can be disposed of briefly. A change in operating costs can be analysed in precisely the same way as a change in demand. An unexpected advance in technology may lead to financial losses, if new capacity is extended up to the limits indicated in section (c), because the price at which the new equipment can produce may be too low to allow the amortisation of capital charges on old equipment. If this occurs, it is even more important than in the case of a fall in demand that capital charges should be written off, and that the adoption of the new methods should not be curtailed or delayed.

Changes in the value of money bring about fortuitous changes in the real value of the burden of debt and depreciation charges which an industry has to bear. It is now widely recognised that, in a period when the value of money is falling, the sums set aside for depreciation should be augmented to the extent necessary to offset the fall in the value of money, and the increase placed in a special reserve. If the value of money began to rise, this reserve could be run down, and if the reserve were insufficient the Minister could authorise a further write-off, and, if necessary, introduce legislation to transfer a corresponding amount of the industry's debts to the Exchequer.

(*e*) *Compensation and Financial Charges*

It has been argued that nationalised industries should cover the full cost of assets which they instal, subject to certain modifications in cases where conditions change unexpectedly. Clearly, a corresponding sum should be covered in the case of assets taken over on nationalisation. The assessment of this sum presents difficult problems, but in any case there are objections, in general, to the method adopted in the Nationalising Statutes, which made the capitalisation of the new boards equal to the compensation paid to the former owners.

To take an extreme case, suppose an industry were nationalised which was formerly in the hands of an uncontrolled monopolist, who was making the greatest profit he could, and that he was fairly compensated for the prospective value of his monopoly profit. If the new board now had to pay interest and redemption instalments on this value, it would clearly be unable to raise the necessary revenue unless it charged the same prices and produced the same output as the monopolist would have produced. Such a result would be widely regarded as defeating one of the main purposes of nationalisation.

It is true that matters have not turned out like this, for several reasons. First, the charges of the former public utility undertakings were subject to restrictions which have now largely been dropped. Secondly, interest charges were kept down because the bonds issued as compensation were guaranteed by the Treasury. Thirdly, the burden of debt has been reduced by the fall in the value of money. Fourthly, some assets were acquired cheaply. Local authorities were compensated only for outstanding debts (plus compensation for severance), and not for the value of the assets acquired. Coal owners were compensated on the basis of earnings between the wars.

The capitalisation of the boards has thus been fixed in a quite haphazard fashion. A better procedure would be to assess the appropriate sum according to a definite principle; if it fell short of the compensation paid, consideration should be given to the possibility of adding the difference to the National Debt and, if it were greater, that Debt might be reduced.

A possible principle of valuation, which is thrown out only as a suggestion, is based on the reflection that the total charge on an asset which has been nationalised should be the same as the charge on a similar asset acquired after nationalisation. This suggests that assets might be valued on the basis of the current costs of replacing them with identical assets, or assets of similar capacity (in the case of obsolete assets), less depreciation for the years of life already past. Special valuations, which would have to be rather arbitrary, would be required in the case of assets which had been acquired on the basis of expectations which had later been disappointed.

In industries where marginal cost is well above average cost, such a valuation would leave a substantial profit. In such cases there would be no harm in imposing a capital charge whose service was expected just to absorb the profit. It is fortunate that this alternative method of valuation exists in these cases, for the excess of marginal over average cost is typical of such industries as mining and agriculture, whose assets might be awkward to value at replacement cost.

Conclusions

The preceding sections have sketched some of the main principles which, after modification to take account of various practical complications, could form the basis of "commercial" rules to be followed by the boards in the absence of special directions to the contrary. Three conclusions have already been set out above (page 130); two more can now be added to the list:

(4) The prices calculated by rules 1–3 should be the prices actually charged, unless expectations prove to be incorrect. The boards should be given limited powers to write off asset values, but large-scale disappointments must be dealt with by the Government. In general, there is a strong case against making up losses by taxing the products of the industry which has experienced a fall in demand or unexpected obsolescence.

(5) Where assets are taken over from private owners, the financial charges to be borne by the nationalised industry should not generally be equal to the compensation paid to former owners. The assets should be revalued on the basis of current replacement costs of equivalent assets, except perhaps where an excess of marginal over average cost makes it possible to impose a higher charge without causing restriction of output.

PARLIAMENTARY CONTROL

The enactment of rules of commercial operation based upon the economic principles outlined in the last section would not only provide criteria for the fixing of prices and the allocation of resources, but should go far to solve the problem of parliamentary control of the nationalised industries. In the first place, the mere provision of rules would increase control of their ordinary commercial operations; moreover, although it would not be possible for an outside authority to enforce precise adherence to the rules, each industry could be required to present its estimates, accounts and reports in a form which indicated, however roughly, whether the rules were being obeyed in each of its activities. Secondly, since the boards would be permitted to deviate from these rules only if explicitly ordered to do so by the Government, the responsibility for such departures could be firmly placed on ministers who would be answerable for them in the usual way. In this way Parliament could gain control, both over the broad outlines of commercial policy and over the details of those matters which are of legitimate political interest. It should then be possible to give up the project for a Select Committee on Nationalised Industries, which has been widely criticised as likely to undermine the commercial independence of the corporations.[7]

[7] The objections are well known, and need not be restated here. See the evidence of Mr. H. Morrison, Lord Reith and Lord Heyworth to the Second Select Committee (H.C. 235/1953), and the Report of the Fourth Select Committee (H.C.

At present, ministers have considerable powers to intervene in the affairs of the nationalised industries in order to use them as instruments of general government policy. We shall not discuss whether these powers should be curtailed (or extended), nor ask in what circumstances such intervention is desirable. Some possible purposes of ministerial intervention will, however, be enumerated, and some suggestions will be made as to the procedure which might be adopted when the industries are required to depart from their normal rules.

To begin with, two categories of intervention may be mentioned which would affect the framework within which the rules operate, but would not involve departures from them. First, a single nationalised industry cannot draw up its plans unless it is provided with information about the plans of other nationalised industries and of private industries, particularly those controlled by the Government. There is therefore a need for " co-ordination " and review of programmes by the Government. Secondly, it might be desirable in some cases to give ministers powers to lay down rules amplifying the general principles of commercial operation set out in the statutes; but it would probably be best to restrict the use of this technique as closely as possible, for fear of undermining the commercial freedom of the boards.

Next, there are the cases where it is believed that some special adjustment of the figures of demand, prices, and costs is required before the commercial rules will yield satisfactory results. First, the operation of an industry may confer benefits, or throw costs on other sections of society, which are not adequately reflected in the industry's accounts. In this category fall such problems as smoke pollution and rural amenities which are dealt with by special methods and fall outside the scope of this paper. Secondly, some " imperfection of the market " may prevent the preferences of consumers and of suppliers of productive resources from being accurately reflected in the demands and costs confronting the industry. In theory, there are numerous features of the economy necessitating such adjustments, but the cases which are of practical importance are mostly due to government intervention in the industry concerned, in industries with which it is closely related, and in the capital market.

Two examples will illustrate the problems which are involved:

(1) The rate of interest paid on the boards' stock issues is well below the " risk rate " which would apply to privately owned concerns undertaking ventures of a similar degree of uncertainty, because they are backed by a Treasury guarantee. Indeed, even in

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120/1955) which failed to find any questions which it could discuss within the restrictions imposed by its terms of reference.

the absence of such a guarantee they would still pay less than the risk rate, as long as it was known that in the last resort the interest payments would be met from the Exchequer. In these circumstances a strong case can be made for imposing a Treasury Surcharge—a sort of underwriter's premium—on all borrowing by the boards, in order to remove the artificial incentive for the nationalised industries to grow more rapidly than other industries.

(2) For several years the Government has intervened to keep coal prices below the level which would equate supply and demand. Its intention has not, of course, been to discourage the supply of coal, but the automatic application of the rules of the last section would have this effect. Therefore, if the rule about pricing is modified by outside intervention, the output rule must be appropriately modified at the same time; and more generally if one of the rules stated in the second part of this article is not followed it may be necessary to modify other rules. There is, for instance, the complex question whether the gas and electricity industries ought to charge coal in their accounts at the market price or at some higher price, bearing in mind that some of their customers can substitute coal bought at market prices for gas and electricity.

Finally, and most important, the Government may intervene in the nationalised industries in order to use them as instruments of its general policy. Such intervention may have a variety of objectives; for instance: the provision of unremunerative activities required for public services such as defence; the redistribution (or maintenance of the existing distribution) of real wealth and income among members of the community; the control of employment and price levels; the regulation of foreign trade; and the control of the capital market. In the following discussion I shall assume—without advocating—that the Government would continue to have wide powers of intervention even if " commercial " rules of operation were enacted. To the extent that the Government loses its powers, the problem of controlling its interventions simply disappears.

In order to maintain the independence of the boards in their ordinary commercial operations, and to secure parliamentary control over interventions, it is necessary that the boards should not be asked to undertake activities, or charge prices, which conflict with their commercial criteria, except by an explicit, published directive. For the same reasons, and especially in view of the economic and financial effects of such orders, it would probably be most appropriate that they should be framed as Statutory Orders requiring an affirmative vote in both Houses. Admittedly it would, in some cases, be necessary that they should come into effect immediately on publication, *e.g.*, in the case of an order announcing price changes, where delay might lead to undesirable speculation in stocks.

It is an essential part of the scheme that the directive should set out the estimated financial effect of the intervention on the nationalised industry, and indicate how it is proposed to deal with it. Take, for instance, a directive whose purpose was to prevent the price of coal from being raised to the level at which supply would equal demand: after setting out the provisions relating to prices, it would have to state whether, and how, the order was intended to affect the rules by which the output of coal was settled, and then estimate what the financial loss to the Coal Board would be. It would then state whether the loss was to be borne by reducing the board's annual profit (if any), by temporary accumulation of losses on the books (*i.e.*, by borrowing), or whether provision for a subsidy was to be included in the next Supply Estimates. Conversely, an order raising coal prices might lead to an increased profit, after allowing for any resulting fall in sales, which could either be retained by the board or become the object of taxation.

The method of finance would, of course, vary greatly from one kind of directive to another. For instance, the temporary regulation of coal prices would probably not require the introduction of special taxes or subsidies. On the other hand, unprofitable branch lines and rural electrification projects might more appropriately be subsidised from national funds than from the revenues paid by other customers of the railway and electricity industries. It would be important that definite principles should be evolved and adhered to even if they were inconvenient in particular instances.

Finally, it is suggested that every effort should be made to isolate, in the estimates, accounts and reports of the boards, the financial effects of Government intervention from the results of the operation of the ordinary commercial criteria.

Since the argument of this essay has been summarised already, it will be sufficient to conclude by restating its main contention. I have advocated the adoption of " commercial " rules for the operation of nationalised industry which would tend to allocate resources according to market forces in cases where special instructions are given by Parliament or Ministers, and have outlined the economic principles on which they could be based. It has been maintained that the enactment of some general rules would help to allocate responsibility for decisions as between ministers and boards, and provide a framework of principle which would permit methodical parliamentary control and reduce the danger of unprincipled *ad hoc* intervention by both Ministers and parliamentary committees.

POLITICAL SCIENCE AND THE JUDICIAL PROCESS

Geoffrey Marshall

" If your subject is law " said Mr. Justice Holmes, " the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life." [1] From anywhere in the field of political philosophy or political science the roads are equally plain to the subject-matter of the law. This is plainest at the highest level of generality. Political theory and jurisprudence have obvious common *foci* of interest, and their differences are in a sense stylistic. Talk about " law," " rights," " sovereignty," " state," " justice," and so on, by jurists and philosophers suggests a necessity at the moment less for lines of demarcation than for mutual translation into each other's idiom. But lower down the scale, at a more institutional level, the political scientist also frequently finds himself occupied with legal notions of a middling degree of generality. A constitution, the courts, the judicial process, are all parts of the machinery of government. Public Administration courses contain a good deal of elementary (and often inadequate) consideration of the rules and principles of administrative law.[2] Perhaps the kind of concern with the subject is different from the lawyers. Perhaps less worry about the specific contents of legal rules, and more about the point, the rationale of rules, or the relation of theories about rules and situations to other types of rules and situations. But you cannot begin to worry about this kind of thing until you have some familiarity with the rules and materials which are brought into the process of comparison and scrutiny. And here there is " Nothing to breathe but air. . . . Nothing to weep but tears." Nowhere to go for law (though the author of the " Pessimist " omitted to say so) but to lawyers. One remedy might be to commission the writing of a " Political Scientist's Guide to Public Law "; but only a corner of the problem is related to the acquisition of information. Essentially the trouble stems from that old bug the " conceptual framework." Students and teachers of politics who can often be found producing sceptical smiles at the mention of this phrase, may

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[1] " The Profession of the Law " (*Collected Legal Papers*, 1920, p. 29).

[2] This point is made in the 1953 UNESCO Report on the Teaching of the Social Sciences in the United Kingdom at p. 59.

well gaze upon the panorama of the judicial process and begin to wonder for the first time whether their methodological friends were right. Without some sort of framework of principles and vocabulary, how does one begin to describe the work of courts of law as it impinges on the governmental process? (How does one even murmur sensible remarks about undergraduate essays on " the Rule of Law " or " The Passing of Parliament: Comment? ")

I have a suspicion that these difficulties stem from something more complex than mere lay inexpertise, and that there is a field here in which the lawyer's interest in the clarification of vocabulary is at least as great as that of the political scientist. What follows is little more than an attempt to suggest one point at which mutual scrutiny of an increasingly popular type of description might pay.

DESCRIPTION OF THE JUDICIAL PROCESS

There is a complex of generalisations about judicial activity to be found in works on government and law which are sometimes advanced in a descriptive fashion and sometimes prescriptively. Recent theoretical writing by lawyers on these themes has produced almost an embarrassment of vocabulary. " Realist " writers have been particularly fruitful in coining both pejorative and laudatory descriptions of the decision process. " Formalistic," " literalistic," " mechanistic," " analytical," " verbalist " are a few of them, intended as descriptions of judicial methods of which the writers disapprove. " Functional," " purposive," " creative," " realist " are logically similar adjectives with approbatory value. What sort of claims are made by these labels and what is their cash-value to the political scientist or the theoretical lawyer?

Much discussion of the judicial function and of the task of statutory interpretation on both sides of the Atlantic has been in terms of defining allegiances to the attitudes held to be mirrored by these terms. Though allegiances shift and cross over according to the concepts used, one approach is often pictured as " analytical " and the other as " purposive." The second approach seems, as far as the non-lawyer can make out, to enjoy more esteem in present-day juristic writing than the first. Two very broad sets of developments—one in the United States and one in this country—seem to have contributed to this. On the one hand, scepticism about judicial thought processes, and " positivist " theories about the " factual " nature of law have tended to cast the logical application of legal rules in the role of smokescreen for sociological realities. On the other hand an impulse has come from the linguistic preoccupations of Anglo-Saxon philosophy. The empiricist analyses early in the present century of the function of names and descriptions; the attention paid in the twenties and thirties to meaning and verification; and the more recent philosophical emphasis on use and usage have all furnished powder and shot to the jurist. The "fallacy of attributing a real existence to the supposed referents of abstract words,"[3] for example, has been expounded repeatedly in legal contexts. Two particular conclusions have seemed applicable in theories about the nature of law and the interpretation of its language. First, that all names and concepts (legal or otherwise) do not correspond to things, and secondly, that analytic and verbal questions sometimes look like or may be presented as empirical ones. Both these principles were exploited, for example, by Dr. Glanville Williams in his series of articles on language and the law.[4] All this, of course, is in the British empirical tradition. "Nothing is more usual," wrote David Hume, "than for philosophers to encroach on the province of grammarians, and to engage in disputes of words while they imagine that they are handling controversies of the deepest importance and concern."[5] But what philosophers have said about the relation between words and things is capable of misapplication. To see, for example, the distinction between analytic and empirical, and the connection of meaning with usage is not necessarily to decree either that all non-empirical questions are trivial and unworthy of attention, or that all usages are equally acceptable and that there are no methods of adjudicating between them. There may be morals to be drawn here too. The concern with words which the philosopher has is not altogether unlike the concern of the judge or the legal adviser. The philosophical appeal to usage, so often misrepresented has been not inappropriately described by the terms "connecting" and "disconnecting."[6] "Do dogs think?, do animals feel?, are partly metaphysical puzzles and partly scientific questions. They are not purely metaphysical; for the reports of scientists about the poor performances of cats in cages and old ladies' stories about the remarkable performances of their pets are not irrelevant. But nor are these stories purely scientific for the stories never settle them."[7] The method of proceeding involves an appeal to other uses of language and to connection with other situations, and "the merits of an argument may be brought out . . . by setting beside it other arguments, in which striking but irrelevant features of the original are changed and relevant features emphasised, just as the merits and demerits of a line of action may be brought out by setting beside it other actions." [8] For "metaphysical" substitute "legal," and for "scientific," "factual" and the analogy to adjudication in law is close. The point about "analysis" of this kind is twofold. It is not a concern with "words" or "mere words" rather than "things." For different reasons, the application of rules requires a knowlege of the world as the drafting of rules requires a knowledge of the world; and judges must get it (to cite Mr. Justice Cardozo) "as the legislator gets it, from experience and study and reflection; in brief from life itself." [9] Deciding how to use language or apply general rules entails more than being able to recite correctly propositions about grammar, syntax or etymology. Though all such processes involve logical reasoning, the "logic" involved is not exclusively syllogistic and deductive. Nor is it therefore formal or automatic in its applications. There seem to be a number of uses of the terms "logic" and "formal," in what might be called meta-legal writing, whose appropriateness and force rest upon a slurring over of these two points (*e.g.*, "A page of history is worth a volume of logic" [10]). Once they are made, broad brave distinctions between the analytic [11] and the purposive or functional approach to judicial decision and canons of statutory construction begin to tremble.

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[3] G. B. J. Hughes, *Jurisprudence* (1955), p. 7.

[4] 62 L.Q.R. *Cf.* "The Controversy Concerning the Word Law," 22 *British Yearbook of International Law* 146 (1945). "Austin (in defining law) was mistaking the function of words, . . . there is no such thing as an intrinsically 'proper' or 'improper' meaning of a word."

[5] *An Enquiry concerning the Principles of Morals*, p. 278 (ed. Green and Grose).

[6] John Wisdom. "Gods," *Essays in Logic and Language* (ed. Flew 1951), p. 199.

[7] *Ibid.*, p. 190.

INTERPRETATION OF LEGISLATIVE LANGUAGE

Systematic discussion of the judicial process, as distinct from methods of interpretation has been carried on for the most part by American and Continental writers, but in the more general aspects of both topics similar moves and vocabulary can be traced. In 1936 in *U.S.* v. *Butler* [12] Mr. Justice Roberts said:

> "The judicial branch of the government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All that the court does or can do is to announce its considered judgment on the question. The only power it has, if such it could be called, is the power of judgment. This court neither approves nor condemns any legislative policy."

[8] *Ibid.*, p. 198.

[9] *The Nature of the Judicial Process* (1921), pp. 112–113.

[10] Mr. Justice Holmes in *New York Trust Co.* v. *Eisner* (1921) 256 U.S. 345 at 349. *Cf.* the contrast drawn between "experience" and the syllogism in *The Common Law* (1881), p. 1.

[11] The same is true also of attitudes to the methods of jurisprudence where the jurist whose interests are "analytic" in the sense of being concerned with the clarification of legal concepts rather than the sociology of law, is apt to be accused of "deductivism." (This point has been made to me by Professor H. L. A. Hart.)

[12] (1936) 297 U.S. 1 at 62–63.

A not untypical comment by an American critic runs as follows:

> "In the earlier cases, Mr. Justice Roberts was anxious to assure both the farmers and the railroad workers that it was the men of 1789 and not he who saved them from congressional charity. . . . If the railroad employees would only read the Constitution they would see that this is so. . . . The farmers should also have been glad to know that Mr. Justice Roberts was almost an automaton in finding that the Agricultural Adjustment Act was opposed to the Constitution. . . . This court neither approves nor condemns any legislative policy. Of course all lawyers and students of constitutional law have known this for a long time. But Mr. Justice Roberts was evidently fearful that the farmers might not be fully aware of it. So he told them, and so they knew." [13]

The critical reaction here follows a certain pattern. It may be that some of the elements of confusion in our ways of talking about the interpretation of legislative language are writ large in the American debate, where it is easier to separate what on a different scale may seem unimportant differences of emphasis. Descriptions of the various " approaches " and " principles " frequently contrast " social policy," [14] " context," [15] " historical," [16] and " broad " [17] approaches, with " pseudo-logical," " literal " or " analytic " approaches. Mixed up in the implied contrast are a number of complaints about the operation of the judicial process. The charges might be set out as follows: —

(1) Reading personal or class prejudices into the words of a statute.

(2) Picturing rules of law as in some sense pre-existent entities to be found rather than made.

(3) Assuming a mechanical or " slide rule " theory of interpretation according to which rules of law apply automatically.

(4) Employing over-narrow, grammatical or " verbalistic " canons of statutory interpretation.

(5) Showing insufficient deference to legislative judgments of fact.

None of these charges logically entails any of the others, and it may be permissible to wonder before heaving all the semantic bricks through all the windows, which of them is apposite in any given case?

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[13] Thomas Reed Powell, *Vagaries and Varieties in Constitutional Interpretation* (Columbia 1956) at pp. 42–43.

[14] W. Friedmann, *Law and Social Change in Contemporary Britain* (1951), p. 246.

[15] G. B. J. Hughes, *Jurisprudence* (1955), p. 284.

[16] R. A. Eastwood, " A Plea for the Historical Interpretation of Statute Law " (1935) J.S.P.T.L. 1.

[17] D. Lloyd in *The United Kingdom: The Development of its Laws and Constitutions* (1955), p. 28.

The quoted comment on *U.S.* v. *Butler*, for example, charges Mr. Justice Roberts with offence (3), automatism, on grounds which, in the absence of a different type of argument, hardly seem logically compulsive. Roberts J. could in fact well be construed as defending himself against the imputation of offence (1). The court's function was not, he plainly stated, a legislative one, of determining in general what powers the Federal Government ought to have, but what had been granted under a Constitution conferring delegated as distinct from sovereign powers. This is why it was, he argued, a misconception to say that the court overruled or vetoed action (to rule or overrule surely is a word having legislative force). The court exercised the "delicate and difficult office"[18] of judgment. It is, of course, arguable that all such talk is unconscious or semi-conscious self-deception,[19] or that any given decision or series of decisions is affected by economic prejudice,[20] but this is a matter for psychological investigation of a kind which is really not in question here. The point is whether there is anything in the statement of the court's duty to judge ("difficult" and "delicate" as Roberts noted it to be) which logically entails the inferences either that the task is mechanical and automatic or that (as suggested) the railroad employees could have performed it themselves. Neither conclusion seems to follow. A better target for the "mechanistic" accusation might be found in such phrases as that "courts declare the law as written."[21] (But even this may have a point which may not involve any delusion of the kind suggested and which is not far removed from the claim frequently made on both sides of a legal argument to be applying a literal canon of interpretation). Mr. Justice Stone who dissented in *U.S.* v. *Butler* from Mr. Justice Roberts' formulation of the court's role and who has been applauded for letting in the light of sociological reality [22] was not above urging a " recognition that language, even of a Constitution, may mean what it says." [23]

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[18] (1936) 297 U.S. 1, 63. The passage cited from Mr. Justice Roberts' judgment is very similar to a passage in Lord Bryce's *American Commonwealth* (1930 ed.), Vol. 1, pp. 252–253. "It is . . . no mere technicality to point out that the American judges do not as Europeans are apt to say 'control the legislature' but simply interpret the law. . . . The will that prevails is the will of the people expressed in the Constitution. . . . All that the judges have to do is to discover from the enactments before them what the will of the people is and apply that will to the facts of a given case. The more general or ambiguous the language which the people have used, so much the more difficult is the task of interpretation, so much greater the need for ability and integrity in the judges. But the task is always the same in its nature. . . . It would be a breach of duty for them to express . . . an opinion on its policy except so far as its policy explains its meaning."

[19] Professor Powell in *Varieties and Vagaries in Constitutional Interpretation* at p. 43 writes "These judicial professions of automatism are most insistent when it is most obvious that they are being honoured in the breach rather than the observance. . . . Try as I will I cannot bring myself to admire both the candor and the capacity of the men who write such things to be forever embalmed in the official law reports. . . . There is a phrase of Professor Burgess's which has always puzzled me: he said of Calhoun and his adherents that 'they were sincere or at least thought themselves sincere.' If men sincerely think themselves sincere, are they not sincere however much in error they may be? If the answer may be in the affirmative then perhaps I should acquit these nonselfvaunting judges of lack of candor. But there remains another possibility."

Harold Laski contented himself, on his own account, with suggesting to Macnaghten J. that his mind might be "more complex than he knew." (Holmes-Laski, *Letters*, Vol. 2, p. 1412.)

[20] Nothing in the present argument is incompatible with a thesis of this kind. The only concern, it should be emphasised, is with the nature of what is said about the judicial process.

[21] *West Coast Hotel* v. *Parrish* (1937) 300 U.S. 379, 404, Sutherland J.

Most examples selected and offered up of the mechanist [24] fallacy are perhaps little more than infelicitous ways of making some other kind of point or of supporting a particular type of construction.[25] The same could be said of dicta which attribute a " changeless meaning " to the words of the law. Such statements are not usually in the running as serious examples of a belief in either changeless entities or automatic application. They often, indeed, seem totally deprived of cash-value. As the Privy Council said in 1936 of section 92 of the Commonwealth of Australia Constitution: —" It is not that the meaning of the words changes but the changing circumstances illustrate and illuminate the full import of that meaning." [26]

JUDICIAL FUNCTION AS LEGISLATIVE FUNCTION

For our narrower domestic debates on interpretation there may be a parallel to the criticism of the judicial function (as described by Roberts J. in *U.S.* v. *Butler*) in a general criticism offered in the name of a " social policy " approach. The parallel lies in equating the proposition that judges ought not to legislate with any or several of the charges detailed above. It may be difficult to say what is entailed by "not legislate," but at the same time possible to say it without committing any of the sins often imputed, and without, in particular, believing in a declaratory or a deductive theory of decision. It is possible, though, to find a refusal to countenance the legislative nature of judicial decision saddled with both these charges. The attitude has even been called (queerly) "judicial positivism." [27] Here again are the traces of the fatal equation between the act of judgment and empty mechanical semantics (and conversely between the acceptance of a legislative function in some sense and a context or social policy method of construction). As with the mechanistic accusation, expressions bearing on their face statements of the "declaratory" fallacy or the "syllogistic" fallacy may in substance be directed to legitimate points which are underplayed by the commentator. In 1951, it is reported, Lord Jowitt, addressing a Law Council convention in Sydney, averred that the function of the House of Lords was to discover the law, not to find out what would be a good or a bad law. The audience was "suitably repressed, except for Dean Griswold of Harvard University Law School who was heard to mutter: That's just what my old granddad used to believe." [28] The moral pointed is that encouragement ought not to be given to the traditional "fiction" or the "general belief in the automatic and impersonal character of judgment." [29]

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[22] " Justice Stone's remarks in the A.A.A. dissent " . . . lift the " veil from mystery, revealing behind judicial pageantry nine human beings, all participants in the governing process. . . . Stone was the urchin who blurted out the facts." (A. T. Mason, *Security Through Freedom: American Political Thought and Practice* (1955), pp. 118–119).

[23] (1936) 297 U.S. 1, 88.

[24] It is difficult to see quite what *could* be meant by a truly " automatic " theory of judicial decision, given an admission that it does not mean an infinite number of rules to allow for each possible combination of circumstances. It may, of course, be used to mean an undue reluctance to apply a principle to cover facts differing in some particulars from earlier ones; or it may be a way of denying that decisions are a " source " of law. But what would it be like for general rules or sources of law to get themselves applied automatically to differing sets of facts?

[25] *e.g.*, " The Australian Constitution is to be expounded and given effect to *according to its own terms* . . . upholding the Constitution throughout *precisely as framed.*" (D. Kerr, *Law of the Australian Constitution* (1925), p. 44.) The description was in intention a report on the particular method of construction adopted by the Australian High Court, *e.g.*, in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1920) 28 C.L.R. 129, which contained dicta to the effect that evidence of the meaning of the constitution was to be sought in the words of the instrument and other evidence of intention rejected.

[26] *James* v. *Commonwealth of Australia* [1936] A.C. 578, 614.

Now this is precisely the sort of comment by lawyers about the judicial process in which the political scientist is interested and of which he is most likely to take hold. Such comment is often necessarily abbreviated and allusive, and its implications not always spelled out. But might not the spelling out of the charges sometimes mitigate the heinousness of the offence. In the instance just cited Lord Jowitt's remarks arose from a discussion in which speakers debating a problem in the common law of negligence "considered questions of social morality, practical convenience, and so forth." [30] This might certainly be called a resort to policy considerations in the sense of a "direct and open canvassing of alternative lines of action." [31] Lord Jowitt's reported statement was clearly directed to the point that in the United Kingdom at any rate this is a description of the judicial function which would be considered legislative rather than adjudicatory. Granted that the view expressed may be conservative, and granted that there may be a whole problem which increases with the "open endedness" of the concepts employed, about the fact that adjudication takes place within a given philosophical and political climate, there is still a difference between a creative or legislative act and decision in the light of principles or rules. Without this distinction the notion of judicial decision hardly makes sense. To envisage the possibility of a judge's recognising that a decision accurately states the law though its effects are unfortunate, it is not necessary to assume either that he is deceived or that he is (trivially) declaring the decision to conflict with personal inclination. The content of the "declaratory" view need logically be no more than this. The view that deference to legislative rules or existing precedents involves *less* uncertainty than acknowledged modification of rules does not in itself entail a belief in the "myth of legal certainty,"[32] or in the automatic penny-in-the-slot view of adjudication. Is not the necessity for social policy approaches sometimes argued as if it did?

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[27] E. McWhinney, "Judicial Positivism in Australia," 2 Am.J.Comp. Law 36 (1953). *Cf.* A. von Mehren, "The Judicial Process: A Comparative Analysis," 5 Am.J. Comp. Law 197 (1956). Other adjectives used include "doctrinal" and "non-functional."

[28] Geoffrey Sawer in *Federalism: An Australian Jubilee Study* (1952), pp. 214–215.

[29] *Ibid.*, p. 215.

[30] Sawyer *loc. cit.*, p. 214.

[31] McWhinney's phrase (*loc. cit.*, 2 A.J.C.L. 36 at p. 38).

"POLICY"

"Policy" is itself a word with important and acknowledged ambiguities. Its adventures in a wider context might conceivably be used to point again a domestic moral. Outside the United Kingdom it is often necessary to pursue an inquiry into the policy (in one sense) of a statute in order to determine whether it falls within the limitations imposed by a federal system or trenches into areas protected by a formal constitutional instrument. Australia, Canada, South Africa and the United States furnish numerous instances of judicial determination of the question whether a statute has in substance or in effect some purpose which is not indicated on the face of the enactment itself. Clearly, however, there is one sense in which courts of law are not concerned with the mere policy or motives or aspirations of legislators, a sense which emerges in the principle that if a legislative act is within power the motives for its passage are irrelevant.[33] But the policy or purpose in another sense of a legislative act may be decisive as to what *sort* of act it is. From this point of view "an inquiry into the purpose of an Act is not an inquiry into the motives of the legislature, but into the substance of the legislation. Regard must be had to substance—to things, not to mere words." [34]

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[32] Nor in complete predictability or infallibility. ("The child's Father-as-Judge was infallible. . . . Grown men when they strive to recapture the emotional satisfaction of the child's world . . . seek in their legal systems the authoritativeness, certainty and predictability which the child believed that he had found in the law laid down by the father. . . . Hence the basic legal myth that the law is, or can be made, unwavering, fixed and settled": Jerome Frank, *Law and the Modern Mind* (1949), p. 20.)

[33] *Huddart Parker, Ltd.* v. *Commonwealth of Australia* (1931) 44 C.L.R. 492, 515. "Once the power over the matter is established, it becomes irrelevant how or upon what grounds or for what purpose it is exercised": *per* Dixon J.

An attachment to " mere words " is one charge preferred by advocates of " policy approaches " to statutory interpretation against those assumed to advocate literal or " pseudo-logical " approaches. But here again it may be necessary to dispute the way in which the alternatives are staked out. Some light may be thrown on this by the distinction between policy in the sense of true purpose, substance, or object and policy in the sense of motive or indirect aim.[35] To deplore a " policy " approach in the sense of reliance on or admission of evidence about legislative or executive purposes and intentions is not necessarily to choose to base interpretation on words in themselves or to reject " policy " in the sense of substance or purpose. The well-known remarks of Denning L.J. in *Seaford Court Estates v. Asher* [36] appear to present as alternative courses of judicial action (a) the necessity " to supplement the written word " so as to act as the makers of a statute would have done in any contingency not provided for, and (b) belief that the English language is " an instrument of mathematical precision." Clearly these are not alternatives, and to condemn the first does not entail embracing the second.

It is easy to contrast " literal " application of statutory language and some other kind of application but not entirely easy to see the precise way in which " literal " is being used here. To oppose the true purpose of a statement to its literal significance is in one sense absurd. " Literal " seems usually to function as a success-label rather than a descriptive term. In a similar way, what is " plain " and what is " implied " about any construction of language has to do with the precise way in which the issue arising from its use is formulated. The majority of the House of Lords in *Smith* v. *East Elloe Rural District Council* [37] formulated the issue of construction arising in that case as being whether the words " a compulsory purchase order . . . shall not

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[34] *R.* v. *Barger* (1908) 6 C.L.R. 41, 75; *cf. W. R. Moran (Pty.), Ltd.* v. *Deputy Commissioner for Taxation* [1940] A.C. 838 at 849. " The purpose and substance of the Acts as a whole, which means little more than their scope and effect, may properly be looked at. The purpose in this sense is inseparably connected with the substance. This does not mean that the court is to seek out the objects, or the purpose, still less the intentions of the members of the Parliament, or the members of the Government responsible for passing the measure."

[35] " ' Motive ' and ' purpose,' ' direct ' and ' indirect ' are not always used in the same sense. The frequent confusion of motive and intention was remarked on by Austin a century ago. . . . It is primarily a question of linguistic usage that there is a real distinction, even if it is related to differences of degree, between what the legislature is directly aiming at, and what its reasons are for so aiming. The former can conveniently be called the purpose of the legislature, the latter its motive." Schreiner J. (dissenting) in *Collins* v. *Minister of the Interior,* 1957 (1) S.A. 552 (A.D.) 577.

[36] [1949] K.B. 481, 499.

[37] [1956] A.C. 736.

. . . be questioned in any legal proceedings whatsoever "[38] could be intended implicitly to exclude compulsory purchase orders obtained in bad faith. On the minority view, on the other hand, the question became in effect whether the words evinced an intention to preclude the possibility of a challenge to bona fides (which could have been explicitly expressed in so many words if Parliament had intended it). On each view, therefore, it could be claimed that implied meanings were being eschewed and literal application of words adopted.

Trends in Judicial Decisions

Allied to the political scientist's feeling of doubt as to whether he ought to adopt as part of his vocabulary the literal, analytical—policy, purpose, type of dichotomy may go a query about the significance of some proffered descriptions in terms of " trends " in judicial decision—particularly (perhaps only) in the sphere in which he is most interested in judicial activity, namely, in its relations with the State. Said in a very general sense which borders on the tautologous, judges are creatures of their political environments, and prisoners, like everyone else of their political and social experience. Law and opinion move together. But inside of this, and said with a different point come those remarks about the changing " attitude " of the courts to individuals, to discretionary powers and to administrative activities with which current controversies have made all students of government familiar. The courts, one may be told for example, have relinquished some of their traditional functions of protecting individual liberty since 1939, or perhaps they have been readier to intervene in recent years than in the period which followed the wartime emergency. *Liversidge* v. *Anderson*[39] is often seen as the high watermark of judicial quietism. On the other hand a relatively " activist " attitude in actions involving compensation, rent, and disciplinary tribunals or the powers of local authorities may be pictured as heralding a revival of judicial willingness to intervene. If one asks " To intervene in what? " the image clouds. Where, for example, does judicial restraint in relation to Town and Country Planning fit in, or the refusal to grant injunctions to prevent the confirmation of schemes drawn up by advisory boards or commissions?[40] A capital difficulty is that disputes affecting the balance of individual liberties as against the claims of the State do not fall along a single line of decision. A " trend " in decision may be visible where, as for example, in the United States a court may be operating within the ambit of a general term such as " due process "; or it may be clear where a series of decisions occurs within a relatively narrow field such as (say) taxation, or industrial compensation.[41] But there is no line of decisions which could properly be described (from this point of view) as actions between individuals and the State. Any suggested trend may be made up of decisions involving the powers of local elected authorities; of officials acting administratively or quasi-judicially, of tribunals, of nationalised industries and statutory bodies, or of Government Departments or Ministers of the Crown. *A priori* there seems no reason to assume that any " propensity to intervene " is independent of the differences between these differing types of dispute and merely varies as a function of one set of attitudes towards " regulation " or " discretion." When to the different statuses and functions of the bodies in question there is added the fact of variations in the language in which different statutes confer discretion or cut down the scope of judicial review, the adequacy of straightforward generalisation about judicial attitudes seems questionable in another dimension. Words such as " abdicate "[42] or " relinquish " carry the possibility that they may inflate the discretionary or voluntary character of refusals to review and underplay the possibility that technical disagreements about interpretation may cut across views of other kinds. A difference of opinion between A and B as to whether a particular form of words plainly expresses a given legislative intention does not necessarily reflect their relative attitudes to legislative policies. It is equally true of extra-judicial opinion that general views of the State and its functions do not correlate easily with attitudes towards the interpretation of statutes. One has only to think of the concord between Laski and Holmes to see that agreement about the second provides no touchstone for the first. In one sense advocacy of the extension of judicial review has lately been associated with right-wing opinions, but such opinions have been essentially views about the proper scope of legislative activity rather than theories about the judicial process, and have stemmed from feelings that the statutory provision of opportunities for entrusting discretion to administrative agencies should be curtailed. The association of left-wing views with hostility both to judicial review and to " literal " or " literalist " emphases on " the words " of the statute is equally a surface equation. Perhaps the only safe general comment about the years since 1939 would be (for what it is worth) that central government officials have come out of things better than anybody else when their exercise of statutory powers has been questioned. If any connecting principle exists here it clearly lies in the direction of saying (as numerous dicta suggest) that in the sphere of central government some statutes more clearly than others direct or imply political responsibility for administrative action. The constitutional respectability and common sense of this principle is naturally greatest at the point where Ministers or fairly senior officials decide and defend administrative activity but it should be possible in principle to say where the fable loses plausibility. " Officials " are not a homogeneous category.[43] Nevertheless, the Law Reports contain little in the way of analysis of the degrees of deference appropriate to different provisions for exercising legislative control. Control by " Parliament " is, of course, to some extent an artificial expression at all levels,[44] but the relative values of full debate, provision for review by affirmative resolution of one or both Houses, or review by prayer to annul are not irrelevant if the fact of legislative consideration is thought important in assessing the necessity for judicial control.[45] Wherever in fact, the phrase " the authority of Parliament " occurs it is usually worth a second glance to see if what is in question really deserves the name. The point may be apposite in debate both about public administration and the interpretation of statutes. Support for " literal " approach to statutes, purged of its associations with " automatism," the " declaratory fallacy," " illiberalism " and the rest, may come down only to an apprehension that legislative authority and the policy of the executive or administrators are not synonymous. This is a familiar enough distinction in certain spheres,[46] but a similar type of contrast is entailed by the view that the policy of the legislature is deposited only in the words of its statutes. The case rests on what Holmes meant by the " externality " of the law. " For constitutional reasons, if for no other, if the same legislature that passed it should declare at a later date a statute to have a meaning which in the opinion of the court the words did not bear, I suppose that the declaratory act would have no effect upon intervening transactions."[47] The " separateness " of legislative and judicial power in this sense may tend to be masked by an accustomed emphasis on the principles of legislative supremacy and cabinet government (though as Dicey noted it is a necessary ingredient in the principle of supremacy itself[48]). Perhaps political scientists should shoulder a part of the blame for this. For years they have encouraged everyone to forget about the separation of powers as quickly as may be, and it is just possible that they have done the job too well.

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[38] Acquisition of Land (Authorisation Procedure) Act, 1946, First Schedule, Part IV, para. 16.

[39] [1942] A.C. 206.

[40] *e.g., Merricks* v. *Heathcoat-Amory* [1955] Ch. 567.

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[41] A good example would be the series of common law decisions on the property rights of married women referred to by Dicey in his chapter on " Judicial Legislation " in *Law and Public Opinion in England* (1930 ed.), pp. 371 *et seq.*

[42] *Cf.* " Had (Dicey) lived to observe the extent to which the High Court has *abdicated* from its jurisdiction, he would, I have no doubt, have preferred today the French result ": C. J. Hamson, *Executive Discretion and Judicial Control* (1954), p. 52. Professor Hamson's thesis, needless to say, cannot be accused of neglecting the effect of legislative initiative in cutting down the field for review.

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[43] *Cf.* D. C. M. Yardley, " Revocation of Licences—An English Dilemma " (1956) *Juridical Review* 240 at 256–257.

[44] *Cf.* Mr. Michael Stewart 535 H.C. Deb., col. 1844; December 15, 1954 (referring to *Hammersmith Borough Council* v. *Boundary Commission for England, The Times,* December 15, 1954):

> " I should like very briefly to refer to the case in the courts yesterday. The judge in that case . . . took the view that he could not intervene because it was possible for this House to intervene. He said that the persons who had a grievance . . . ' were represented in Parliament like other citizens and could air their grievances there '—always provided that they are lucky enough to catch your eye, Mr. Speaker—' and if there was justice in what they said, due weight would be given to it.' The learned judge is not acquainted with the operation of three line whips."

[45] *e.g.,* in *Magistrates of Ayr* v. *Lord Advocate,* 1950 S.C. 102, 107, the proposition that Parliament had made it plain that a decision was to be taken by itself was founded on the fact that provision existed for an administrative scheme to be subject to negative resolution.

[46] *e.g.,* Evidence of the General Council of the Bar, Franks Committee on Administrative Tribunals and Enquiries, p. 698. " We should not like to see the statement of policy . . . being taken to be conclusive against the objection. . . . We regard the ability to criticise what is, after all, not parliamentary but solely departmental policy as being one of the vital safeguards of the judicial part of the administrative decision."

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[47] " The Theory of Legal Interpretation," 12 *Harvard Law Review* 417, 420.

[48] *Law of the Constitution* (19th ed., p. 4067): " The sovereignty of Parliament favours the supremacy of the law of the land. . . . The principle that Parliament speaks only through an Act of Parliament greatly increases the authority of the judges."

CURRENT SURVEY

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This digest, which has been compiled by the Editor, covers the period from January 1, 1957, to March 31, 1957.

UNITED KINGDOM

AGRICULTURE

Marketing schemes

Report has been published of Agricultural Marketing Schemes for the years 1938 to 1955 (H.C. 57 of 1956–1957).

See also INQUIRIES (p. 158, below).

COMPULSORY PURCHASE

Compensation

Legal costs and expenses. The claimant, whose house had been compulsorily purchased by the Crawley Development Corporation at an agreed price which included the legal costs of that purchase and expenses of removal to other premises and the cost of alterations to curtains and carpets for use in the new premises, claimed in addition legal costs and travelling expenses incurred by her, first, in an abortive proposed purchase of a new home, and, secondly, in an actual purchase of a new home. *Held,* (1) the additional items claimed were not within the agreed purchase price; (2) the additional items which the claimant claimed were directly attributable to her having been turned out of her house and she was entitled to recover them: HARVEY *v.* CRAWLEY DEVELOPMENT CORPORATION [1957] 2 W.L.R. 332, C.A. (affirming decision of the Lands Tribunal).

Local inquiry

See STEELE *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND WEST HAM COUNTY BOROUGH COUNCIL (p. 177, below).

COURTS

Account

High Court and Court of Appeal. The Account of receipts and expenditure for 1955–1956 has been published by the Treasury.

Administration of Justice

Statutory amendment. Orders have been made fixing January 1, 1957, and March 1, 1957, as the days for the coming into operation and force of Part V and Schedule I respectively of the Administration of Justice Act, 1956 (S.I. 1956 No. 2099; 1957 No. 306).

Legal Aid

Account. The Account of receipts and expenses of the Law Society of Scotland, 1955–1956, together with the report of the Comptroller and Auditor-General, has been published (H.C. 84 of 1956–1957).

Report. The Sixth Report of the Law Society on the operation and finance of Part I of the Act of 1949 and comments and recommendations made by the Advisory Committee have been published by the Lord Chancellor's Office.

EDUCATION

Independent schools

Registration. An Order has been made bringing into operation Part III of the Education Act, 1944, on September 30, 1957 (S.I. 1957 No. 96).

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Appointments

Government. On January 10, 1957, it was announced from Buckingham Palace that the Queen had offered Mr. Harold Macmillan the office of Prime Minister and First Lord of the Treasury and that he had accepted. In addition to the Prime Minister there are seventeen Ministers in the new Cabinet and nineteen Ministers not in the Cabinet.

On March 29, 1957, it was announced that Lord Salisbury, Lord President of the Council and Leader of the House of Lords, had resigned from the Government; and that he would be succeeded by Lord Home who would continue as Secretary of State for Commonwealth Relations (*The Times*, March 30, 1957); and see **Cyprus** (pp. 181, 182, below).

Budget

Statement. On March 4, 1957, the Leader of the Opposition moved: That this House regrets the premature disclosure of a Budget intention by the President of the Board of Trade and calls upon the Prime Minister to uphold the high standards established by parliamentary tradition in such circumstances. After debate, the motion was defeated by 307 to 252 (565 H.C. Deb. 40–134).

Civil Service

Staffs employed. A statement has been issued showing the numbers of Civil Staffs employed in Government Departments on January 1, 1957, as compared with October 1, 1956. It shows a total of 637,423 (including 252,285 Post Office staffs) on the later date which is a decrease of 1,885 (Cmnd. 89; see also above, p. 59).

Inspectorate

Factories. The Minister of Labour and National Service stated that action was proceeding on all the recommendations in the Report on Staffing and Organisation (563 H.C. Deb. 19–20, January 22, 1957; see also above, p. 59).

Ministers' Functions

Defence. On January 24, 1957, the Prime Minister stated:

" Under the Ministry of Defence Act, 1946, the Minister of Defence is responsible for the formulation and general application of a unified policy relating to the Armed Forces of the Crown as a whole and their requirements. I have entrusted the Minister of Defence with the task of formulating, in the light of present strategic needs, a defence policy which will secure a substantial reduction in expenditure and in manpower, and to prepare a plan for reshaping and reorganising the armed forces in accordance therewith.

" Subject as necessary to consultation with the Cabinet and Defence Committee, and with the Treasury on matters of finance, the Minister will have authority to give decisions on all matters of policy affecting the size, shape, organisation and disposition of the Armed Forces, their equipment and supply (including defence research and development), and their pay and conditions of service. He will similarly have power of decision on any matters of Service administration or appointments which, in his opinion, are of special importance." (563 H.C. Deb. 399–404).

Post Office. The Commercial Accounts 1955–1956 have been published together with the Report of the Comptroller and Auditor General thereon (H.C. 26 of 1956–1957).

Power. An Order has been made changing the style and title of the Minister of Fuel and Power to " the Minister of Power " from January 16, 1957 (S.I. 1957 No. 48).

An Order has been made transferring to the Minister of Power functions hitherto performed by the Board of Trade in relation to iron and steel (S.I. 1957 No. 95).

Research

National Reserch Development Corporation. The report and statement of accounts for 1955–1956 have been published (H.C. 107 of 1956–1957).

Security

Procedure. The Financial Secretary to the Treasury stated on January 30, 1957, that the procedure for civil servants had been revised. On February 12, 1957, he stated that others affected continued to have the same rights as civil servants. The new procedure is as follows:

" 1. The Minister [1] will have before him information on which to decide whether the reliability of the civil servant is prima facie to be regarded as in doubt on security grounds. A civil servant will be so regarded if:

(*a*) he is, or is to be, employed in connection with work the nature of which is vital to the security of the State; and simultaneously;

(*b*) he is or has recently been a member of the British Communist [2] Party, or in such a way as to raise reasonable doubts about his reliability, is or has recently been sympathetic to Communism, associated with Communists or Communist sympathisers, or is susceptible to Communist pressure.

No statement of general application can be made as to what constitutes sympathy or association under (*b*) above. Each case will be assessed in the light of the particular facts.

2. If the Minister rules that there is a prima facie case, the civil servant is at once to be so informed and will normally be sent on special leave with pay, care being taken as far as possible not to disclose the reasons for his absence to his colleagues.

3. The civil servant will at the same time be given any particulars, such as the date of his alleged membership, or the nature of the alleged sympathies or associations, that might enable him to clear himself. There will, however, have to be limits to the information given for he cannot be given such particulars as might involve the disclosure of the sources of the evidence.

4. At the same time the civil servant will be asked to say whether he accepts or denies the allegation. If he accepts the allegation he will be dealt with as described in paragraphs 9 and 10 below. If he does not admit the allegation he shall have fourteen days in which to make written representations to the Minister if he so wishes.

5. The Minister will reconsider his prima facie ruling in the light of any representations the civil servant may make. If the Minister decides that there is no reason for varying it, the civil servant shall be so informed and shall

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[1] That is, the Minister responsible for the Department to which the Civil Servant belongs.

[2] In this Statement of Procedure, for convenience and brevity the term " Communist " is used to cover Communist and Fascist alike.

then have seven days in which to decide whether to ask for a reference to the Three Advisers. If he does not ask for such a reference he will be dealt with as in paragraph 8 below. If he does ask for a reference to the Three Advisers the latter will be asked to consider the case as soon as possible.

6. The function of the Three Advisers is set out in their terms of reference. Where there is no suggestion of Communist or Fascist associations or sympathies, cases of character defects will not be referred to the tribunal, and appeals will be dealt with under the normal disciplinary procedure of Departments.

7. In discharging their functions the Advisers will take into account the representations made by the civil servant. They will hear him in person, if he so wishes. He may also ask third parties to testify to them as to his record, reliability and character but he may not be accompanied and/or represented by a third party before them. In the special circumstances of these cases the proceedings must be governed by the requirement that neither sources of evidence nor evidence which might involve the disclosure of sources can be given to the person concerned. The Advisers will therefore count it as an important part of their functions to see that anyone appearing before them can make his points effectively and will adapt their procedure in such a way as to give him the best possible opportunity of bringing out the points which he wishes to bring to their notice.

8. On receiving the report of the Three Advisers, the Minister will reconsider his prima facie ruling and if he decides to uphold it, he will give the civil servant an opportunity of making representations to himself or his representative before action is finally taken. Similar opportunity will be given when the civil servant does not wish his case to go to the Advisers.

9. If the prima facie ruling is finally upheld, a civil servant will be posted to or retained in a non-secret branch within his own Department, or, if this is not practicable, will be posted to a non-secret branch in another Department. If he belongs to a category which it is impossible to employ in any other than a secret branch, or if his qualifications or experience are such that no alternative employment elsewhere in the Government service can be found, he will have to be dismissed unless he accepts the option, which should always be afforded in such cases, of resigning.

10. Before a decision to re-post, or in the last resort, to dismiss (with resignation as the alternative), is made effective, the civil servant's staff association should be afforded an opportunity of suggesting any alternative re-posting that it may think more suitable, or of suggesting a possible re-posting as an alternative to dismissal or resignation.

11. If a civil servant resigns or is dismissed the existing Superannuation Acts provide automatically for certain consequences in his superannuation benefits. These consequences are:

(a) *For Established Civil Servants.* 1. Dismissal or resignation of officers under age 50 entails the loss of benefits under the Superannuation Acts.

2. Officers aged 50 and upwards may resign voluntarily and receive at 60 the pension which had accrued to them at the time of their resignation.

3. Officers of any age who take up employment in another public service to which the Transfer Rules and Public Office Rules apply, would be eligible for the arrangements which may be made under those Rules. It should be noted that, if they are to be applied, the prior consent of the head of the Department is required to the change of employment.

(b) *For Unestablished Civil Servants.* 4. Officers who have completed seven years' service and who resign or are dismissed will receive the benefits to which they are entitled under the Superannuation Acts."

The following revised terms of reference have been given to the Three Advisers.

> "1. It is the policy of Her Majesty's Government that no one who is or has recently been a member of the British Communist Party or of a Fascist organisation or who, in such a way as to raise legitimate doubts about his reliability, is or has recently been sympathetic to Communism or Fascism or associated with Communists[3] or Communist sympathisers or is susceptible to Communist pressure, should be employed in connection with work the nature of which is vital to the security of the State.
>
> 2. You have been appointed to advise Ministers in any cases referred to you whether in your opinion their *prima facie* ruling that an individual comes under paragraph 1 has or has not been substantiated. In doing so you should answer the following questions:
>
> (i) Are there or are there not reasonable grounds for supposing that the individual has or has recently had Communist sympathies or associations of the type described in paragraph 1 above?
>
> (ii) If you are in doubt about the answer to (i) above, how do you assess the evidence whether presented to you or elicited at the hearing before you?
>
> 3. In answering these questions your aim should be to give the Minister the utmost help in deciding himself what course to take.
>
> 4. If you agree with the *prima facie* ruling you should specify your grounds. If you do not agree with the *prima facie* ruling or do not reach a firm opinion in any instance you should assess the evidence for the Minister reporting the weight which you have attached to particular factors.
>
> 5. You should in all cases take precautions to safeguard any very secret sources from which any of the information bearing on the conclusions has been obtained.
>
> 6. In the appreciation of a case defects of an individual's character should be taken into account when they bear upon his reliability in the general context of Communist associations or sympathies. (Where no question of such associations or sympathies arises, cases of character defects will not be referred to you, but appeals will be dealt with under the normal disciplinary procedure of Departments.)
>
> 7. A decision on what employment is to be regarded as involving 'connection with work the nature of which is vital to the security of the State' is not one for you but for Ministers in charge of Departments. Your functions do not extend beyond advising Ministers as set out above."

The National Staff Side have been consulted and their views taken into account; but they are not thereby made parties to the terms of these documents and in fact dissent on certain points (563 H.C. Deb. *197–202*, January 30, 1957; 564 H.C. Deb. *156*, February 12, 1957).

The Three Advisers are: Sir Alexander Little (aged 61) (Chairman), Director-General, General Post Office, 1949–1955; Sir Frederick Leggett (aged 72), Chief Industrial Commissioner, 1940–1942, and Deputy Secretary, Ministry of Labour, 1942–1945; Sir William Bowen (aged 80), formerly General Secretary, Union of Post Office Workers; M.P. for Crewe, 1929–1931; Chairman, Ruskin College, Oxford; Chairman L.C.C. 1949–1952; as reserve member, Sir Maurice Holmes (aged 71), Permanent Secretary Board of Education, 1937–1945 (564 H.C. Deb. *202*).

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (p. 176, below).

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[3] In these terms of reference for convenience and brevity the term "Communist" is hereafter used to cover Communist and Fascist alike.

HOUSING

Compulsory purchase order

See STEELE *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND WEST HAM COUNTY BOROUGH COUNCIL (p. 177, below).

Rent scheme

The plaintiff in 1934 was granted the tenancy of a house on the then newly completed housing estate of the defendants. The houses were built under the Housing Act, 1925, and did not attract any Exchequer subsidy. The plaintiff's house consisted of three bedrooms, a living room, kitchenette and bathroom, and the amount he paid for it at first was 13s. a week, 10s. being rent and 3s. rates, but the total had risen by 1948 to 22s. a week. In 1951 the plaintiff's wages had risen to £11 a week, his wife earned £3 a week, and there was one child living at home who contributed £2 10s. a week. The 1948 revision of rents still left the landlords as regards the estate income a deficiency payable out of the general rates. In 1950 the defendants decided to adopt a differential rent scheme under the Housing Act, 1936, and £2 a week, which was a maximum rent, was now demanded from the plaintiff, who did not qualify for any rebate. The plaintiff sought a declaration that a decision made by the defendant council on November 22, 1951, and amended by them on September 30, 1954, authorising the introduction and operation of a differential rent scheme, in respect of houses provided by the defendants under Part V of the Housing Act, 1936, was *ultra vires* and void. *Held*, the only financial limitation of the charges which a local authority may impose on the management of its housing estate is the requirement of s. 83 of the Housing Act, 1936, that the charges must be reasonable; on the facts, the rent demanded of the plaintiffs was, having regard to the market value of the house, reasonable; accordingly, the action must be dismissed: SUMMERFIELD *v.* HAMPSTEAD BOROUGH COUNCIL [1957] 1 W.L.R. 167; [1957] 1 All E.R. 221; Harman J. (applying *Belcher* v. *Reading Corporation* [1950] Ch. 380).

Subsidies

Slum clearance. The Ministry of Housing and Local Government has issued a circular on indirect re-housing (Circular No. 2/57).

Temporary houses

Policy. The Ministry of Housing and Local Government has issued a circular on housing and planning policy on temporary houses. The circular states that the Minister is willing to arrange for the sale of these houses to local authorities at £150 each (Circular No. 9/57).

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (p. 177, below).

INQUIRIES

Marketing scheme

The British Egg Marketing Scheme (Approval) Order, 1956, came into operation on December 31, 1956 (S.I. 1956 No. 2082; see also above, p. 60).

Transport

Railways. The Report by Lt.-Col. G. R. S. Wilson on the accidents which occurred on the railways of Great Britain during 1955 has been published by the Ministry of Transport and Civil Aviation.

The Report has been published on the collision on August 25, 1956, at Filey Holiday Camp Station in the North Eastern Region. The Report is dated October 2, 1956.

The Report has been published on the collision on September 6, 1956, at Ludlow in the Western Region. The Report is dated January 18, 1957.

Local Government

Finance

Borrowing. The rates of interest chargeable on loans advanced from the Local Loans Fund from February 16, 1957 (other than loans for not more than five years, which remain at 5¼ per cent.) have been reduced to 5½ per cent. (from 5¾ per cent.) (S.I. 1957 No. 230 revoking S.I. 1956 No. 1638; and see above, p. 61).

Rating and valuation. There has been a number of decisions on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. See *Derbyshire Miners' Welfare Committee* v. *Skegness U. D. C.* (1956) 50 R. & I.T. 18; *National Deposit Friendly Society Trustees* v. *Skegness U. D. C.* [1957] 2 W.L.R. 322, [1957] 1 All E.R. 407; *Independent Order of Oddfellows, Manchester Unity Friendly Society* v. *Manchester City Council* (1957) 50 R. & I.T. 59; *Loyal Duke of York Lodge Independent Order of Oddfellows, Manchester Unity Friendly Society* v. *Leatherhead U. D. C.* (1957) 50 R. & I.T. 61; *Ladbrook Park Golf Club* v. *Stratford-on-Avon R. D. C.* (1957) 50 R. & I.T. 91; *Berry* v. *St. Marylebone Borough Council* [1957] 1 W.L.R. 495, [1957] 1 All E.R. 681; *Distillers Sports Club* v. *Esher U. D. C.* (1957) 50 R. & I.T. 148; *Newport Playgoers' Society* v. *Newport County Borough Council* (1957) 50 R. & I.T. 149.

The Rating and Valuation Act, 1957 (5 & 6 Eliz. 2, c. 17), received the Royal Assent on March 21, 1957. The Act reduces the rateable value of hereditaments not being dwelling-houses, private garages or private storage premises by one-fifth; this applies to hereditaments where the rateable value is equal to the net annual value. The Act also deals with payments in lieu of rates by British Transport Commission and Central Electricity Authority, the rating liability of area Gas Boards, and the effect of relief of charities, etc., on rateable value for the purposes of Exchequer Equalisation Grants, etc.

Review. The Government proposals are discussed above (p. 95). For the detailed statement of the proposals, see 564 H.C. Deb. 1081–1089 and 201 H.L. Deb. 679–685, February 12, 1957; 567 H.C. Deb. *23–25*, March 18, 1957. The Ministry of Housing and Local Government stated that a White Paper would be laid before Parliament after discussions with local authorities had been concluded and that this would be before the summer recess.

Legislative powers

Procedure. A private members' Bill [27] to dispense with the necessity for a borough or urban district council to hold a town's meeting and, if demanded, a local poll, before it could promote a Bill, was debated on Second Reading on February 15, 1957 (564 H.C. Deb. 1639–1692).

Police

Recovery of wages. Two police constables in the employ of different police authorities were injured while on duty by the negligence of the defendants and as a result of their injuries were incapacitated from performing their duties for several months. During that period of incapacity the respective police authorities, acting under statutory regulations, paid the constables their full wages and allowances. The constables recovered damages from the defendants, but these damages did not include amounts for loss of wages. The police authorities, basing their claims on unjust benefit, sued the defendants for the amounts of wages and allowances paid to the constables during the period of their incapacity. *Held*, that the defendants, having paid to the constables by way of damages all that they were in law liable to pay, could not be said to have derived unjust benefit by reason of the police authorities' payments; and that accordingly the police authorities had no cause of action: RECEIVER FOR THE METROPOLITAN POLICE DISTRICT *v.* CROYDON CORPORATION; MONMOUTHSHIRE COUNTY COUNCIL v. SMITH [1957] 2 W.L.R. 33; [1957] 1 All E.R. 78.

Status

On February 26, 1957, the House of Commons debated, on Second Reading, the Stockton-on-Tees Corporation Bill to confer county borough status on the corporation. The motion for Second Reading was defeated by 201 to 95.

See also COMPULSORY PURCHASE (p. 153, above), EDUCATION (p. 154, above), HOUSING (p. 158, above), PUBLIC HEALTH (p. 174, below).

MONOPOLIES AND RESTRICTIVE PRACTICES

References

Imported timber. The Board of Trade made a reference on February 14, 1957, under section 12 of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, asking the Monopolies Commission to investigate and report whether and to what extent the parties concerned had complied with the recommendations of the Commission in their report on imported timber (which was signed on July 23, 1953 and published on October 27, 1953) (564 H.C. Deb. *222–223*).

Registrations

Agreements. The President of the Board of Trade stated that about 1,200 agreements had been sent to the Registrar by February 28, 1957, and that these would be available for public inspection on April 15, 1957 (567 H.C. Deb. 1314–1315, March 28, 1957).

Reports

Electrical and Allied Machinery and Plant. The report of the Commission has been published (H.C. 42 of 1956–1957). The Commission found that the conditions to which the Act of 1948 applies prevailed and that the common price system was against the public interest (565 H.C. Deb. *109–113*).

Electronic Valves and Cathode Ray Tubes. The report of the Monopolies Commission has been published (H.C. 16 of 1956–1957). The Commission found that the conditions to which the Act of 1948 applies prevailed because members of the British Radio Valve Manufacturers Association accounted in 1954 for 93·5 per cent. of the total U.K. supply of valves and 92 per cent. of the supply of tubes and have conducted their affairs so as to restrict competition. Furthermore one firm, Mullard Ltd., were responsible for 67 per cent. of the supply of valves and 51 per cent. of the supply of tubes (564 H.C. Deb. *223–225*; and see 565 H.C. Deb. 205–206).

Industrial and Medical Gases. The report of the Commission has been published (H.C. 13 of 1956–1957). The Commission found that the conditions, to which the Act of 1948 applies prevailed in respect of the supply of oxygen, dissolved acetylene and propane. With regard to the first two, the Commission found that the conditions to which the Act of 1948 applies did exist—because the British Oxygen Company Ltd. and its subsidiaries account for almost the entire supply in the United Kingdom of each of these gases. The Commission also found that the conditions and things done as a result of, or for the purpose of preserving, these conditions, operated and might be expected to continue to operate, against the public interest, unless changes were made and safeguards introduced.

With regard to propane, the Commission found that although both the supply and the distribution were under monopolistic conditions within the terms of the Act, these conditions did not operate against the public interest and might not be expected to do so in future, provided that the existing degree of competition continued.

The British Oxygen Company Ltd. has published a booklet on this report entitled " British Oxygen and the Monopolies Commission."

Metal Windows and Doors. The report of the Commission has been published (H.C. 14 of 1956–1957). The Commission found that the conditions to which the Act of 1948 applies did exist but that for the most part they did not operate against the public interest.

Tea. The report of the Commission has been published (H.C. 15 of 1956–1957). The Commission found that the conditions to which the Act of 1948 applies prevailed but that, in general, the tea trade in Great Britain is " conducted on keenly competitive lines and the severe fluctuations in the price of tea since decontrol have not been due to the existing ' monopoly ' conditions or restrictive practices in the United Kingdom tea trade."

Eighth Annual Report (for 1956) of the Board of Trade on the operation of the Monopolies and Restrictive Practices Acts, 1948 and 1953, has been published (H.C. 97 of 1956–1957).

The reconstituted Monopolies Commission has before it the following references: (*a*) the supply of chemical fertilizers; (*b*) the supply of cigarettes and manufactured cigarette and pipe tobacco; (*c*) the supply of machinery for the manufacture or packaging of cigarettes or of cigarette or pipe tobacco; (*d*) a reference under Section 12 of the 1948 Act asking the Commission to report whether and to what extent the parties concerned have complied with the Commission's recommendation in their report on the supply of imported timber (published in 1953) that the agreements and undertakings by traders on the Approved Lists to deal only with each other should be abrogated and should not be replaced by any other arrangements or undertakings having similar effects (referred February 14, 1957).

On November 23, 1956, it was announced that the Board of Trade intended also to make a reference to the Commission on the supply of certain electrical equipment for motor-vehicles.

NATIONAL HEALTH SERVICE

Remuneration

Royal Commission. On February 20, 1957, the Prime Minister announced the appointment of a Royal Commission (565 H.C. Deb. 431–434; 201 H.L. Deb. 1087–1091). On February 28, 1957, the terms of reference were announced: " To consider: How the levels of professional remuneration from all sources now received by doctors and dentists taking any part in the National Health Service compares with that received by members of other professions, by other members of the medical and dental professions and by people engaged in connected occupations; what should be the proper current levels of remuneration to such doctors and dentists by the National Health Service; what arrangements should be made to keep that remuneration under review " (565 H.C. Deb. 1397–1399). On March 12, 1957, the Prime Minister stated that Sir Harry Pilkington had been appointed chairman and that the other members were: Mrs. Baxter, Mr. A. D. Bonham-Carter, Mr. J. H. Gunlake, Professor John Jewkes, Mr. I. D. McIntosh, Sir David Hughes Parry, Sir Hugh Watson and Mr. Samuel Watson (566 H.C. Deb. 981–986; 202 H.L. Deb. 459–461).

See also SUBORDINATE LEGISLATION (p. 176, below), TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (pp. 176, 178, below).

NATIONAL INSURANCE

Benefits

Advisory committee. The National Insurance Advisory Committee having considered the draft N.I. (New entrants transitional) Amendment Regulations, 1957, recommended that the regulations should be made in the form of the draft (H.C. 91 of 1956–1957).

Debate. On February 25, 1957, the House of Commons debated a motion calling on the Government immediately to increase the level of retirement and old age pensions and other benefits and to request the National Assistance Board to adjust its scales of assistance. The motion was defeated by 306 to 252 and an amendment to the contrary carried (565 H.C. Deb. 867–1000).

Widows. The appointed day for the purposes of section 2 (5) of the Family Allowances and National Insurance Act, 1956 (which relates to the entitlement to a widow's pension of a widow who ceases to be entitled to a widowed mother's allowance), is February 4, 1957 (S.I. 1956 No. 2107).

Contributions

Widows. Regulations have been made adding a new provision to the National Insurance (Married Women) Regulations, 1948, whereby a widow, on ceasing to be entitled to a widow's allowance or a widowed mother's allowance in certain circumstances, is deemed to satisfy the contribution conditions for unemployment and sickness benefit and retirement pension as respects the minimum number of contributions required to have been paid since her entry into insurance; she is also granted certain credits of contributions counting for unemployment and sickness benefit, is treated as having paid certain contributions counting for the purpose of additional days of unemployment benefit and is relieved from the possibility of exhausting her right to sickness benefit (S.I. 1956 No. 2108).

Decisions of the Commissioner and the Tribunal

"*Confinement.*" Normally home confinement grant is not payable where the confinement takes place in accommodation provided under the National Health Service. Under an exception to this the claimant must prove, *inter alia*, that "not later than the end of the third day after the day during which her confinement took place and not later than the end of the fifth day after the date of her admission to that accommodation she was discharged therefrom by and with the approval of a person authorised or empowered to discharge her" (S.I. 1954 No. 189, reg. 5 (1); S.I. 1955 No. 498).

Claimant had prepared for a home confinement, but was admitted to the ante-natal ward of hospital under the National Health Service on account of pre-eclamptic toxaemia associated with her pregnancy. She was admitted to and confined in the maternity ward of this hospital six days later and was discharged within three days after her confinement. *Held*, that her admission to the ante-natal ward was "in connection with her confinement" and that as her discharge was later than the fifth day after the date of her admission, she was not entitled to home confinement grant: Decision No. R(G) 9/56.

Day of unemployment. For the purposes of unemployment and sickness benefit a day shall not be treated as a day of unemployment if on that day a person does no work and (i) is on holiday or (ii) is a person who does not ordinarily work on every day in a week (except Sunday or other substituted day) but who has, in the week in which the said day occurs, been employed to the full extent normal in his case (S.I. 1948 No. 1277, reg. 6 (1) (*e*)).

Claimant had been working a five-day week and was discharged on a Friday. He was available for employment on the following day. *Held*, that a five-day week was normal for the claimant and in the week in which he was discharged he had been employed to the full extent normal in this case. The Saturday of that week could not be treated as a day of unemployment: Decision No. R(U) 29/56.

Over the preceding year a night-watchman had been scheduled to work different series of shifts in alternate weeks. For the last three months his schedule was four nights one week and two nights plus a shift of 29½ hours ending at 5 p.m. on Sunday in the next week. He had also worked numerous extra shifts. *Held*, that although he was a person who did not ordinarily work on every day of the week, it was not possible to determine the full extent of employment normal in his case. As regards the 29½ hours continuous duty over Saturday/Sunday, this was to be attributed to the week ending at midnight Saturday/Sunday: Decision No. R(U) 37/56.

Claimant was employed as a postman on a day-to-day basis over Christmas and the New Year. New Year's Day was observed as a customary holiday in his postal branch and the claimant was not required to work on that day. He was again employed on the following day. *Held*, that he was on holiday on New Year's Day, which was a day in a season during which it had become customary for him to work for the Post Office: Decision No. R(U) 31/56.

Reg. 6 (1) (*a*) provides that a day shall not be treated as a day of unemployment if it is a day in respect of which the claimant fails to prove that he is unemployed.

A local tribunal decided that an agreement in the paper-making industry providing that, except in certain circumstances, a worker could not be "stood-off" without pay for more than two days or shifts in a pay week, guaranteed wages for the whole pay week including two "stand-off" days. *Held*, that, in any pay week in which a worker was "stood-off" without pay in accordance with the agreement, the pay he received could not be regarded as covering the idle days, and that those days were days of unemployment: Decision No. R(U) 30/56.

"Discharged" from hospital.

Claimant to home confinement grant was confined in hospital and discharged herself against medical advice on the following day. She contended that the hospital authorities, in providing an ambulance for her return, had consented to her discharge. *Held*, that the claimant was not discharged from hospital with the approval of a person authorised or empowered to discharge her: Decision No. R(G) 10/56.

Claimant had made arrangements to be confined at home, but she was admitted at short notice to hospital, where confinement occurred three days later. She was discharged six days after admission. *Held*, that home confinement grant was not payable. She was not discharged until after the end of the fifth day after the date of her admission, which was the time limit applicable. Commissioner emphasises that local tribunals have no power to extend the precise time limits prescribed by the regulations: Decision No. R(G) 11/56.

Where a certified mental patient is in a hospital, a certain part of sickness benefit otherwise payable is accumulated and withheld. It is not payable unless and until the claimant "is discharged from the hospital . . . by and with the approval of a person authorised or empowered to discharge him" (S.I. 1949 No. 1461, reg. 5 (3) (*b*); S.I. 1952 No. 2179).

A certified mental patient escaped from the mental hospital. After fourteen days of freedom he was formally certified as discharged. *Held*, that he was not discharged with the approval of a person authorised or empowered to discharge him as required by the National Insurance (Hospital In-patients) Regulations: Decision No. R(S) 12/56.

See also note under "*Confinement*" (above).

Earnings limit. Under National Insurance Act, 1946, s. 17 (3) (as amended), a widow's pension is reduced if she earns more than the limit prescribed. "Earnings" means "the net remuneration or profit derived . . . from any occupation" (S.I. 1948 No. 1278, reg. 4 (1) (*a*); S.I. 1949 No. 1984).

A widow became a director of her late husband's company, receiving fees and an expense allowance as a means of recovering money she had lent him. She performed no duties. *Held*, that however little a director may do it is not possible to say that a director has no occupation. The widow was gainfully occupied and her fees were earnings: Decision No. R(G) 14/56.

Similarly, a claimant is not entitled to an increase in the rate of his sickness benefit in respect of his wife if she is engaged in an occupation from which her weekly earnings exceed the prescribed amount.

After claimant had been incapable of work for some nine months his wife took over the running of his wholesale grocery business during his incapacity. She received no wages. *Held*, that an increase of benefit was not payable in respect of the wife from the date she started running the business as she then became gainfully occupied and the major part of the profits constituted her earnings: Decision No. R(S) 11/56.

A man claimed an increase of benefit in respect of his wife, who commenced work part way through the week in employment in which she worked 4½ hours each day for a rate of 2s. an hour, aggregating £2 14s. a week. For that part week her earnings were 36s. On certain subsequent single days she did not work, her duties having been performed by a fellow employee for whom she did a similar service on other days. *Held*, that the claimant's wife was in one employment only from which she earned a regular weekly wage exceeding 40s., and that this applied from the day she began work. Also held that there had been no break in the wife's occupation on those days when she did not work. R(S) 27/54 distinguished. Distinction drawn between daily basis of title to benefit and weekly basis of calculation of earnings: Decision No. R(S) 6/56.

Failure to apply for suitable employment. Under the Act of 1946, s. 13 (2), a person is disqualified for unemployment benefit if he, without good cause, fails to apply for a situation in suitable employment.

A furniture upholsterer who had been employed by the same firm for a number of years was, while working short-time four days a week, offered temporary full-time employment in the same occupation with another firm. *Held*, that the claimant had good cause for failure to apply for the situation: Decision No. R(U) 34/56.

Guaranteed week. See [1956] P.L. 155–156 and above, p. 65.

Claimant's employers were not members of Employers' Federation but observed agreements between the Federation and the Unions. An amendment to a guarantee agreement was not brought to the notice of the employers until after the days for which benefit was claimed. *Held*, that there could be no alteration in an undertaking by mutual consent until the suggested alteration was known to both parties and they had decided to adopt it. Nothing done on a given date could alter the mutual obligations by which the parties were in fact bound on a day before that date: Decision No. R(U) 40/56.

"*Her husband.*" Under the Act of 1946, s. 21 (1) "Subject to the provisions of this Act, a woman over pensionable age shall be entitled to a retirement pension by virtue of the insurance of her husband, being a husband—(*a*) to whom she is married at the time when she attains that age; or (*b*) in respect of whose death she was immediately before attaining that age entitled to widow's benefit; or (*c*) whom she has married after attaining that age; if the following conditions are satisfied, that is to say:—(i) either that he is over pensionable age and both have retired from regular employment, or that he is dead; and (ii) that he satisfies the relevant contribution conditions; and (iii) in a case where she has married the husband after attaining pensionable age, such further conditions as may be prescribed." Under section 20 (2) (*b*) ". . . a person shall not be treated as having retired from regular employment unless he has given the prescribed notice of his retirement, but if on the date of the notice . . . he has so retired, he shall be deemed so to retire on that date."

The claimant was divorced from her husband after she attained pensionable age but before the date on which her entitlement to pension would begin, *i.e.*, the date on which she gave notice of retirement. *Held*, that on that date she had no husband and so was not entitled to a pension based on a husband's insurance: Decision No. R(P) 14/56.

Husband and wife residing together. Under N. I. (Hospital In-Patients) Regulations, 1949 (S.I. 1949 No. 1461, as amended by S.I. 1952 No. 2179) a claimant can be regarded as having a dependant, if an increase of benefit would have been payable to him in respect of his wife if she had not attained pensionable age, that is to say, if he could be treated as residing with or wholly or mainly maintaining her.

A retirement pensioner and his wife were living in accommodation provided under Part III of the National Assistance Act, 1948. Because married quarters were not available, they had to sleep in separate dormitories in the same building, but spent their time otherwise together in the dining and sitting rooms. *Held*, that they were residing together: Decision No. R(P) 15/56.

Illegitimate child. At the death of the mother of an illegitimate child whose father could not be traced, the child was a child of the family of her husband and herself. At the date of a claim to guardian's allowance made by the child's grandmother, the child was a child of the claimant's family. *Held*, that the claimant was entitled, although the child was illegitimate, to the benefit of regulation 5 of the National Insurance (Guardian's Allowance) Regulations, 1948, which provides that where at the death of one parent the other cannot be traced there shall be substituted for the condition that the parents are dead the condition that one parent is dead: Decision No. R(G) 13/56.

Late claim. Unemployment benefit must as a general rule be claimed on the day in respect of which the claim is made, and a claimant is disqualified for receiving benefit which is not thus claimed in time, unless he proves that there was good cause for his failure to claim before the date on which the claim was actually made.

Seven weeks after employment terminated, a claim for unemployment benefit was made for those weeks. The local tribunal found no good cause for failure to claim within the prescribed time but reduced the period of disqualification for late claim from seven weeks to three weeks. *Held*, that the local tribunal had no option but to hold that claimant was disqualified for the whole period covered by the late claim: Decision No. R(U) 35/56.

Overlapping benefit. Under N. I. (Overlapping Benefits) Regulations, 1948 (S.I. 1948 No. 2711, as amended by S.I. 1952 No. 526) " training allowance " is defined as " an allowance . . . payable, out of public funds, by a Government department. . . ."

Held, that teachers' training grants paid by a local education authority are not training allowances for overlapping benefit purposes even though the authority may be entitled to reimbursement out of public funds from a Government Department: Decision No. R(U) 38/56.

Refusal of suitable employment. Under the Act of 1946, s. 13 (2) a person is disqualified for unemployment benefit if he, without good cause, refuses to apply for a situation in suitable employment.

A married woman refused to apply for employment at a Royal Ordnance Factory because she considered the employment dangerous. *Held*, that she had not shown good cause for refusing to apply for a situation which was in suitable employment. There was no evidence that there was any greater danger than was necessarily incidental to work in that kind of factory generally or that the work would be more dangerous for her than for the other workers employed there: Decision No. R(U) 32/56.

Retirement—continuing to work. Under the Act of 1946, s. 20 (2) a person may be treated as having retired from regular employment if he is engaged in a gainful occupation (i) only occasionally or (ii) to an inconsiderable extent or (iii) otherwise in circumstances not inconsistent with retirement.

Claimant intimated that she intended to have a gainful occupation in the school meals service working an unvarying schedule amounting to 17 hours a week. There was no suggestion that she would not be fully occupied during her hours of duty or that she would be given special privileges. *Held,* that the work was inconsistent with retirement. Comparisons made with other decisions: Decision No. R(P) 18/56.

Claimant and his wife had been employed jointly for nine years as caretakers of a meeting house of considerable size. Their duties included cleaning and stoking, and attendance during the day when a reading room and library were open to the public and on certain nights when meetings were held. They received a joint wage of £4 a week with free accommodation, coal, gas and light. *Held,* that the claimant could not be treated as having retired from regular employment. The question whether a person can be so treated depends not on earnings but upon the amount and kind of work involved in his occupation: Decision No. R(P) 16/56.

Retirement—notice. Claimant gave notice of retirement in advance. In the event her retirement was delayed for a week or so. She reported this orally but did not give a fresh notice of retirement until several weeks later. It was suggested that retirement might be accepted from the date of actual retirement by virtue of the original notice, although that date was later than the date stated in the notice. *Held,* that retirement could only be accepted from the date of the fresh notice of retirement. A notice of retirement is valid only for the date stated in it, or the date of the notice if later, and not for any other date: Decision No. R(P) 17/56.

Seasonal worker. See above, p. 66.

For two out of the preceding three years claimant was sick during a period of non-employment in the spring. He had similar periods off work in two earlier years, in one of which he was sick. *Held,* that claimant was a seasonal worker. Where the employment record is obscured by frequently recurring spells of sickness it may be necessary to look beyond the three year period to ascertain whether sickness was the reason for the non-employment or was merely co-incident with it: Decision No. R(U) 36/56.

Suspension without pay. A civil servant was suspended from duty without pay for alleged misconduct which was being investigated. When the investigation was complete he would be either discharged or reinstated and receive the withheld salary. *Held,* that he was unemployed from the date of suspension. The provisions of the National Insurance Act, 1946, which deal with unemployment benefit constitute a scheme of insurance against the event of the loss of the insured person's means of livelihood. It would be contrary to the manifest object of such a scheme that when this event has occurred and the insured person has suffered the loss of his means of livelihood he should be denied benefit because of the possibility that he might receive a payment at some unknown future date: Decision No. R(U) 33/56.

Trade dispute. Under the Act of 1946, s. 13 (1), the disqualification for receiving unemployment benefit during a stoppage of work due to a trade dispute applies so long as the stoppage of work continues " except in a case where, during the stoppage of work, the claimant has become bona fide employed elsewhere in the occupation which he usually follows or has become regularly engaged in some other occupation."

A boilermaker lost employment as a result of a stoppage of work due to a trade dispute between his union and another union. He obtained intermittent work in his usual occupation in a different port but returned to his previous employer on termination of the dispute. *Held,* that he had not proved that he had become bona fide employed elsewhere. His employment at a different port was a temporary expedient to tide him over the period of the stoppage and no permanent severance of relations with his original employer was intended: Decision No. R(U) 39/56.

Finance

Accounts of the National Insurance Fund for 1955–1956 have been published together with the report of the Comptroller and Auditor General thereon (H.C. 115 of 1956–1957).

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Decisions of the Commissioner and the Tribunal

Award. Under the National Insurance (Industrial Injuries) Act, 1946, s. 52 (4): " where on review or appeal a decision under this Part of this Act is revised, or is reversed or varied, the decision given on the review or appeal shall require repayment to the Industrial Injuries Fund of any benefit paid in pursuance of the original decision to the extent to which it (*a*) would not have been payable if the decision on the review or appeal had been given in the first instance; and (*b*) is not directed to be treated as paid on account of the benefit awarded by the decision on review or appeal: Provided that repayment shall not be required in any case where the beneficiary is shown to the satisfaction of the person or tribunal determining the review or appeal to have acted in good faith in all respects as to the obtaining and receipt of the benefit."

Claimant was paid a disablement gratuity of £18 10s. 0d. in respect of an assessment of 1 per cent. for life. On appeal the assessment was revised to 7 per cent. for seven months and the £16 15s. 0d. gratuity which became payable was treated as having been paid. A further six months' assessment resulted in a gratuity of £6 9s. 0d. becoming payable. *Held*, that the sum of £1 15s. 0d. outstanding after the original award had been offset against the award on appeal was correctly taken into account when a further award was made. Not to do so would be to make more than one award for the same loss of faculty in respect of the same period: Decision No. R(I) 43/56.

Coronary disease. See below, Decisions No. R(I) 31/56, 32/56, 49/56.

" *Out of and in the course of employment.*" Under the Act of 1946, s. 7, a claimant must show, *inter alia*, that personal injury was caused by accident arising out of and in the course of his employment.

A bricklayer's labourer, aged 68, suffered an attack of coronary thrombosis and collapsed when he was attemping to do the work of another labourer in addition to his own. He had not previously suffered from any symptoms of heart disease. *Held*, that the claimant suffered injury caused by accident arising out of and in the course of his employment. The carrying of loads required to supply two bricklayers single-handed must have involved very great effort which was also for the claimant most unaccustomed and which, on the balance of probability, did play some part in causing the thrombosis: Decision No. R(I) 31/56.

A slag picker, who had shown symptoms of heart disease during the previous eight years, had to climb steps and a slope to reach pit baths, where he collapsed and died while changing for the afternoon shift. *Held*, on the medical evidence, that death did not result from injury caused by accident arising out of and in the course of employment. The coronary arteries were in such a condition that death might have occurred spontaneously at any moment, irrespective of effort. There was nothing unusual or exorbitant in the effort, which he made every working day, of climbing the slope and steps of the baths: Decision No. R(I) 32/56.

A male nurse at a mental hospital was injured whilst on duty when he was playing football with other members of the staff and some of the patients.

Held, that the accident was not an industrial accident. The main purpose of the game was to help to select a staff football team. General principles for such cases are discussed: Decision No. R(I) 33/56.

A logsaw maker claimed that his incapacity on account of " epigastric hernia " was caused by strain in moving a heavy case of saws, by which he had been partially trapped. *Held,* on medical evidence, that the claimant had not established that he suffered injury by accident arising out of and in the course of his employment. An epigastric hernia has no pouch connecting it with the abdominal cavity and so is known as a " false " hernia, in contrast to the common inguinal, femoral and umbilical hernias which have such a pouch and are known as " true " hernias. In view of the absence of this pouch strain almost certainly plays no part in its formation: Decision No. R(I) 34/56.

Claimant, employed as a pneumatic hammerer for thirty years, was certified to be suffering from motor neurone disease. *Held,* on the medical evidence, that the claimant had not established that he suffered injury arising out of and in the course of his employment. Motor neurone disease is a progressive disorder characterised by wasting and weakening of the voluntary muscles. There is no medical evidence that any relationship has been established between trauma and the disease, and even had there been so, the injury would have been the result of a " process." (Compare Decision C.I.257/49 (reported)). Decision No. R(I) 35/56.

A grammar school mistress who had agreed, on appointment, to undertake " extra-mural activities " was injured while in Switzerland, supervising a ski-ing party of pupils from the school. *Held,* that the claimant suffered personal injury by industrial accident. The expedition, which had been approved by the Borough Education Officer, promoted the physical and mental well-being of the pupils and was part of the work of the school in which the claimant was obliged to engage: Decision No. R(I) 39/56.

A labourer employed by an Electricity Board received fatal injuries while travelling in a van owned by the Board and driven by his charge hand. The accident occurred after the van had left the direct route between two substations of the Board, to enable the charge hand to visit his doctor. *Held,* that death resulted from injury caused by accident arising out of and in the course of employment. The deceased was not affected by the driver's action in deviating for a purpose of his own, and by staying in the van was intending to carry on with employment as expeditiously as possible (R(I) 40/55 distinguished): Decision No. R(I) 40/56.

A machine assistant during a lull in her work handed a sweet to a colleague, who was not working at the time. In doing so she had to reach across a circular saw table and as the saw started up she received injuries to her hand. *Held,* that the injury did not arise out of her employment. Handing a sweet to a colleague was in no way incidental to the work of the claimant and the fact that she and her colleague were temporarily unoccupied did not make it so: Decision No. R(I) 41/56.

A seaman, who had signed articles to serve on a ship for six months, sustained an accident when he was boarding the ship one night in order to recommence work next morning. *Held,* that the claimant suffered personal injury by accident arising out of and in the course of employment. The claimant was on articles and within the sphere of his employment. Decision R(I) 75/53 distinguished: Decision No. R(I) 45/56.

A kitchen hand in a restaurant felt a fit coming on while he was attending a dish-washing machine. He knew nothing more until he came to in hospital having suffered an injury to his hand either by burning on a hot plate or scalding. *Held,* that the injury was caused by accident arising out of and in the course of employment. The claimant's work caused him to be exposed to abnormal risks of injury: Decision No. R(I) 57/56.

Claimant had called at employer's premises to hand in a medical certificate and discuss her return to work on the following Monday. While there she was struck by a vehicle and received injury. *Held,* that the accident arose out of and in the course of her employment. The claimant was doing something reasonably incidental to the work she was obliged to do. Decision R(I) 53/54 compared: Decision No. R(I) 48/56.

In November, 1955, a tractor driver cranked the engine of the tractor and within an hour developed a coronary thrombosis. It was accepted that this thrombosis and the resulting incapacity was the result of an injury he had suffered in that accident. He remained incapable of work and was admitted to hospital in March, 1956, with a second thrombosis. On April 10 he died suddenly as a result of a third thrombosis. *Held,* on the medical evidence, that death did not result from the injury suffered by accident in November 1955. One attack of coronary thrombosis does not predispose to a second or subsequent attack so it is impossible to hold that the effort at work five months earlier was the cause of the third and fatal thrombosis: Decision No. R(I) 49/56.

The claimant slipped and injured her foot while going with the permission of her employers to the telephone room of the firm to make a telephone inquiry about the non-delivery of fruit and flowers ordered on behalf of the employees for a sick colleague. *Held,* that the injury was not caused by accident arising out of and in the course of employment. The purpose of the telephone call was not incidental to the claimant's employment as an inspector of electrical accessories: Decision No. R(I) 53/56.

Section 9 of the Act of 1946 provides—

"(1) An accident happening while an insured person is, with the express or implied permission of his employer, travelling as a passenger by any vehicle to or from his place of work shall, notwithstanding that he is under no obligation to his employer to travel by that vehicle, be deemed to arise out of and in the course of his employment, if—

- (*a*) the accident would have been deemed so to have arisen had he been under such an obligation; and
- (*b*) at the time of the accident, the vehicle—
  - (i) is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements made with his employer; and
  - (ii) is not being operated in the ordinary course of a public transport service.

(2) In this section references to a vehicle include references to a ship, vessel or aircraft."

A farm labourer received fatal injuries when he fell from his employer's tractor on which he was riding home to dinner from that part of the farm where he had been working. When the accident occurred, the tractor had crossed the public road which divided the farm and was in a private road serving the deceased's home. *Held,* that death resulted from injury by industrial accident. The tractor was a vehicle operated by or on behalf of the employer within the meaning of section 9 of the Act. But for the effect of section 9 the deceased would have left the ambit of his employment when he crossed the public road. The Commissioner in determining an appeal is not restricted to reviewing only that aspect of the case specified by the local appeal tribunal as the reason for granting leave to appeal: Decision No. R(I) 24/56.

Prescribed disease. Under the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I. 1948 No. 1371 as amended by S.I. 1951 No. 305), Sched. I, Pt. I, item 38 (*a*) the relevant occupation is described as "any occupation involving close and frequent contact with a source or sources of tuberculosis infection by reason of employment in the medical treatment or nursing of a person or persons suffering from tuberculosis, or in a service ancillary to such treatment or nursing."

A heating engineer, incapable of work by reason of tuberculosis, had worked for several months on the installation of heating equipment in both new and old wards of a sanatorium. *Held,* that tuberculosis was prescribed in relation to the claimant as his employment had involved entering wards occupied by patients to remedy defects in the heating system. Meaning of " ancillary services " discussed with special reference to Decisions R(I) 87/52 and R(I) 12/55: Decision No. R(I) 37/56.

Under S.I. 1948 No. 1371 (above) (as amended by S.I. 1954 No. 5), Sched. I, Part II, para. 10 (*b*), pneumoconiosis is prescribed for an occupation involving " the working or handling above ground at any coal mine of any minerals extracted therefrom, or any operation incidental thereto."

Claimant worked at a coal screening plant sorting coal from seven neighbouring mines. The plant was administered from and originally belonged to a colliery a quarter of a mile away. *Held,* that pneumoconiosis was prescribed in relation to the claimant. A screening plant on mine premises comes under the definition of a mine and the claimant was engaged in handling minerals extracted from that mine: Decision No. R(I) 52/56.

Procedure. In the course of Decision No. R(I) 36/56 the Commissioner said: " Complaint has been made that at the local appeal tribunal there was produced in evidence for the first time on behalf of the claimant an elaborate and closely reasoned opinion (which I have carefully considered) from a consultant physician, who did not himself attend. The insurance officer and his medical advisers had had no opportunity of considering this statement before it was produced to the tribunal. It is desirable that, where an expert opinion is going to be relied upon without calling the witness in person, a copy of the opinion should be supplied to the other side well in advance of the hearing. Otherwise the chairman of the tribunal may feel impelled to grant an adjournment at the request of the side which is taken by surprise."

See also above, Decision No. R(I) 24/56, last sentence.

Special hardship allowance. A miner was awarded retirement pension from January 4, 1951. On March 28, 1955, he claimed disablement benefit with effect from July 5, 1948, on account of pneumoconiosis. Disablement benefit was awarded from January 1, 1954. *Held,* that claimant was not entitled to an increase of disablement benefit. At the date of development of the disease, as fixed by the medical board, the claimant had retired and could not be regarded as having a regular occupation. Regulation 4 of the Prescribed Diseases (Amendment) Regulations, 1954, did not assist him: Decision No. R(I) 44/56.

A butchery factory worker, a single man, suffered an industrial accident while working in the South of England and returned to his home in the North. He was awarded disablement benefit and special hardship allowance. A medical board later considered him capable of employment as a light labourer. *Held,* that the claimant was entitled to a payment of 1s. 8d. per week by way of special hardship allowance. This sum represented the difference between the current wages in his former occupation and those as a light labourer in the district where he was working at the time of the accident and to which he could be expected to return to obtain suitable employment: Decision R(I) 46/56.

Tribunal constitution. Under National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1299), reg. 15 (4):

" So far as practicable, each member of a panel shall be summoned to serve in turn upon a local tribunal:

Provided that—

(*a*) no member of a panel shall serve as a member of a local tribunal during the consideration of a case (i) in which he appears as the representative of a claimant or beneficiary; or (ii) by which he is

> or may be directly affected; or (iii) in which he has taken any part as an official of an association of employed persons or as an employer or as a witness or as a person to whom any question arising thereon has been referred for examination and report or otherwise ";

Claimant, an employee of the National Coal Board, contended that the decision of a local appeal tribunal was invalid on the ground that the member chosen from the employers' panel was the area labour officer of the Board for an area which included the pit in which the claimant worked. *Held*, that the tribunal was properly constituted, the labour officer's membership not offending against the rules of natural justice or the requirements of provisos (*a*) (ii) and (iii) of regulation 15 (4) of the Determination of Claims and Questions Regulations: Decision No. R(I) 51/56.

Tuberculosis. The cause of death of a mental nurse was certified as haemoptysis and sarcoidosis. Tuberculosis was prescribed in relation to him and during the last nine years he had attended a chest hospital on various occasions. The specialist had not indicated that the deceased had suffered from tuberculosis. *Held*, on the medical evidence available, that it had not been established that death resulted from tuberculosis. Medical opinion was divided on the connection between sarcoidosis and tuberculosis, and there was no other evidence that the deceased had suffered from tuberculosis: Decision No. R(I) 38/56.

Finance

Accounts of the Industrial Injuries Fund for 1955–1956 have been published, together with the report of the Comptroller and Auditor-General thereon (H.C. 115 of 1956–1957).

Review

Error of law. In 1936 a colliery pick sharpener sustained an injury to both eyes while at work, his right eye being rendered almost blind. In 1955 he suffered a further injury by which the condition of his left eye was so severely aggravated that he was almost totally blind. On his claim for disablement benefit under the National Insurance (Industrial Injuries) Act, 1946, two medical boards provisionally assessed the degree of disablement at 100 per cent.; but a third board made no award. The claimant appealed to a medical appeal tribunal which incorporated in its award an extract from a specialist's report on the state of both eyes; but in making its award the tribunal assessed the aggravation at only 20 per cent. which was not a correct assessment in accordance with the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948. *Held*, (1) that although the error of the tribunal did not appear on the face of their adjudication, by incorporating the specialist's report they made it part of the record and the facts thereby disclosed were sufficient to show the error in law as it was then apparent that the award of 20 per cent. must be wrong; (2) that notwithstanding that the Act stated that the decision of the tribunal was to be final, it was open to the court to issue certiorari to quash it for an error of law on the face of the record.

Semble, that a decision of the National Insurance and Industrial Insurance Commissioners was also subject to supervision by certiorari: R. *v*. MEDICAL APPEAL TRIBUNAL, *ex p*. GILMORE [1957] 2 W.L.R. 498.

NATIONALISED INDUSTRIES

Airways

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by British Overseas Airways Corporation (H.C. 48 of 1956–1957) and British European Airways Corporation (H.C. 49 of 1956–1957).

Coal

Debate. On February 28, 1957, the House of Commons debated a motion taking note of the Annual Report and Statement of Accounts of the National Coal Board for 1955 (565 H.C. Deb. 1411–1527).

Finance. The Treasury has fixed the rate of 6 per cent. on the amount of compensation under Coal Industry Nationalisation Act, 1946, ss. 19 (2), 22 (2) (*a*), for the period July 1, 1956 to December 31, 1956 (S.I. 1957 No. 7).

Overseas activities. An Order has been made authorising the National Coal Board to search and bore for coal in the North Sea within a distance of 10 miles from the British coast (S.I. 1957 No. 389).

See also SUBORDINATE LEGISLATION (p. 176, below).

Electricity

Consultative councils. The Minister of Power stated that the total cost of the 12 councils in England and Wales for 1956 was £32,169 (201 H.L. Deb. 416, February 5, 1957). And see *Reports*, below.

Guarantees. The Treasury issued statements of guarantee on loans proposed to be raised by the Central Electricity Authority (H.C. 51 of 1956–1957), the North of Scotland Hydro-Electric Board (H.C. 53 of 1956–1957) and the South of Scotland Electricity Board (H.C. 54 of 1956–1957).

Reports. The Annual Report and Statement of Accounts for 1956 of the North of Scotland Hydro-Electric Board and the Report of the Electricity Consultative Council for the North of Scotland District have been published (H.C. 77 of 1956–1957).

The Report and Accounts for 1956 of the South of Scotland Electricity Board and the Report of the Electricity Consultative Council for the South of Scotland District have been published (H.C. 104 of 1956–1957).

Gas

Guarantee. The Treasury issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 52 of 1956–1957).

Transport

Charges. The Transport Tribunal has published the British Transport Commission (Railway Merchandise) Charges Scheme, 1957, confirmed by Order dated December 31, 1956 (S.O. Code No. 88–98*).

Debate. The British Transport Commission Bill was given a Second Reading, after debate, by the House of Commons on March 13, 1957 (566 H.C. Deb. 1209–1253).

Finance. The Transport (Railway Finances) Act, 1957 (5 & 6 Eliz. 2, c. 9) received the Royal Assent on February 26, 1957. This Act empowers the British Transport Commission to borrow, by means of advances from the Minister, sums (not exceeding £250m. in aggregate) (i) to meet any deficit on revenue account of British Railways for 1956 or any of the next six years; (ii) to pay interest on money so borrowed (see also, above, pp. 3, 70–71).

Guarantee. The Treasury issued a statement of guarantee on loans proposed to be raised by the British Transport Commission (H.C. 56 of 1956–1957).

PARLIAMENT

Estimates Committee (House of Commons)

Reports. The Select Committee on Estimates issued a Special Report containing the observations of the Treasury and the Minister of Transport and Civil Aviation on the First Report of the Committee in 1955–1956 (on

Civil Aerodromes and Ground Services) (H.C. 35 of 1956–1957). The Committee issued its First Report (on Her Majesty's Stationery Office) (H.C. 33 of 1956–1957); its Second Report (on Supply of Military Aircraft) (H.C. 34 of 1956–1957); its Third Report (on Stores and Ordnance Depots of the Service Departments) (H.C. 60 of 1956–1957). The Committee issued a 2nd Special Report containing the observations of the Secretary of State for War on the Third Report of the Committee in 1955–1956 (on Works and Buildings of the Service Departments), and observations of the Treasury and the Minister of Works on the Fifth Report of the Committee in 1955–1956 (on Ministry of Works: Directorate General of Works) (H.C. 102 of 1956–1957).

Privilege

Newspaper article (*Sunday Express*). The Second Report from the Committee of Privileges found Mr. Junor, the Editor of the *Sunday Express*, guilty of a serious contempt and recommended that he should be severely reprimanded (H.C. 38 of 1956–1957; and see above, p. 72). On January 23, 1957, the House of Commons, after debate, resolved " That Mr. John Junor do attend this House Tomorrow at a quarter past Three o'clock " (563 H.C. Deb. 203–218). On January 24, 1957, the House of Commons, having heard a statement from Mr. Junor, resolved: " That this House doth agree with the Committee of Privileges in their opinion that Mr. John Junor has been guilty of a serious contempt of this House, but, in view of the apology made to this House by him, this House will proceed no further in the matter " (563 H.C. Deb. 407–409).

Newspaper cartoon (*Evening News*). The Third Report from the Committee of Privileges found that the words of the caption constituted a reflection on all Members of the House and a contempt but recommended, in view of the withdrawal of the cartoon at the earliest possible moment and of the voluntary publication of a full and unqualified apology, that no further action be taken by the House (H.C. 39 of 1956–1957; and see above, p. 72).

British Broadcasting Corporation. On December 21, 1956, in the programme called " Any Questions," Mrs. Stocks said: " The only people who are really well off under this rationing scheme are M.P.s and potential M.P.s who are nursing constituencies and who, apparently, have as much petrol as they want to drive about their constituencies." This was referred by the House of Commons to the Committee of Privileges on January 22, 1957 (563 H.C. Deb. 40–41). The Fourth Report of the Committee found that this was not a contempt (H.C. 74 of 1956–1957).

Newspaper statement (*Romford Recorder*). Other statements relating to petrol rationing and allocations to Members of Parliament were found by the Committee of Privileges in its Fourth Report not to constitute contempts (563 H.C. Deb. 42–52; H.C. 74 of 1956–1957).

Procedure

Allocation of time. A guillotine motion on the Rent Bill was debated by the House of Commons on February 4, 1957 (564 H.C. Deb. 38–178).

House of Lords. The House agreed to certain procedural changes concerning the procedure on Report stage of Bills, the constitution of the Committee for Privileges, the interval between Questions on a Division, and Quorum on Divisions (201 H.L. Deb. 418–422, February 5, 1957).

Written answer. On January 29, 1957, Mr. Brockway, M.P. raised a point of order in the House of Commons. He stated that he had tabled a Question for Written Answer the day before and had received the following reply, from the Minister of Defence, which was also circulated to the Press: " Defence expenditure is expected to be approximately £1,540 million of which about £35 million is extra expenditure due to the Suez crisis. The total would be £1,620 million before taking account of United States aid and German support costs." Mr. Brockway said that in *Hansard* the second sentence was omitted. The Speaker said he had made inquiries and found that a revised Answer was supplied by the Ministry to the Official Reporters but that the earlier draft had been sent by the Ministry inadvertently to Mr. Brockway and the Press. The Speaker said that he considered that Departments should take great care that the Answer supplied to a Member and that supplied to the Official Reporters were in identical terms. The Ministry of Defence expressed regret at the mistake (563 H.C. Deb. 857–866).

Public Accounts Committee (House of Commons)

Reports. The Committee issued a Special Report containing the Treasury Minute on the Fourth, Fifth and Sixth Reports of 1955–1956; and Tables setting forth the comparison of Audited Expenditure with Exchequer Issues and the General Abstract of the Appropriation Accounts for 1954–1955 (H.C. 75 of 1956–1957).

The Committee issued its First Report reporting excess expenditure on Class IV vote 4, Class VI vote 9, and Class VII vote 10 (H.C. 93 of 1956–1957).

See also SUBORDINATE LEGISLATION (p. 176, below).

PUBLIC AUTHORITIES

Agricultural Land Commission

The Accounts for 1955–1956 have been published of the Management and the Farming of Land by the Commission and the Welsh Agricultural Land Sub-Commission, together with the report of the Comptroller and Auditor General thereon (H.C. 114 of 1956–1957).

Goods Vehicles

Licensing authorities. The Summary of Annual Reports of the Licensing Authorities for Goods Vehicles for 1954–1955 has been published by the Ministry of Transport and Civil Aviation (S.O. Code No. 55–178–0–55).

Iron and Steel Holding and Realisation Agency

The Report and statement of Accounts for 1955–1956 have been published (H.C. 41 of 1956–1957).

White Fish Authority

Account of receipts and payments of grants for 1955–1956 have been published (H.C. 59 of 1956–1957).

PUBLIC HEALTH

Regulation

Air pollution. The Ministry of Housing and Local Government has issued Circular No. 64/56 and two memoranda (Miscellaneous Provisions, and Smoke Control Areas) on the Clean Air Act, 1956 (see [1956] P.L. 394).

REMEDIES

Certiorari

See R. *v.* MEDICAL APPEAL TRIBUNAL, *ex p.* GILMORE (p. 171, above).

See R. *v.* PATENTS APPEAL TRIBUNAL, *ex p.* CHAMPION PAPER AND FIBRE CO. (p. 178, below).

Declaration

Per Denning L.J.: "The remedy by declaration is available at the present day so as to insure that a board or other authority set up by Parliament makes its determinations in accordance with the law; and this is so, no matter whether the determinations are judicial or disciplinary, or . . . administrative determinations: . . . The remedy is not excluded by the fact that the determination of the board is by statute made 'final.' Parliament only gives the impress of finality to the decisions of the board on the condition that they are reached in accordance with the law, and the Queen's courts can issue a declaration to see that this condition is fulfilled": TAYLOR (FORMERLY KRÄUPL) *v.* NATIONAL ASSISTANCE BOARD [1957] 2 W.L.R. 189, 193; [1957] 1 All E.R. 183.

Injunction

A remedy by injunction for a breach of a statute exists only if a right has been infringed and the mere fact that an illegality has been committed because the provisions of a statute have been broken is not, of itself, enough; but it is sufficient if a public right has been infringed if the suit be by the Attorney-General, who is the only authority who has a right to bring a civil suit upon the infringement of public rights. A right is none the less public because it has been given by a statute which has been infringed.

Per curiam: It must be a matter of administrative discretion for the Attorney-General what method is chosen for the enforcement of the law.

Per curiam, further: "I distinguish . . . between administrative discretion and judicial discretion. The Attorney-General . . . is the officer of the Crown who is entrusted with the enforcement of the law. If he, having surveyed the different ways that are open to him for seeing that the law is enforced and that it is not defied, has come to the conclusion that the most effective is to ask this court for a mandatory injunction—and I am satisfied that the very nature of a relator action means that he has surveyed those ways and has come to that conclusion—then I think that this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances. I am dealing purely with that type of case in which the only substantial ground for not granting an injunction is that there are other remedies available. In cases where other circumstances which are not primarily a matter for administrative discretion arise, then different considerations might apply and a different view be taken."

The defendant, despite the refusal of planning permission to develop land as a caravan site, so used the land. He was convicted under section 24 of the Town and Country Planning Act, 1947, in 1953, in January, 1954, and again in April, 1954, and on default of payment of a £75 fine was sent to prison for one month. In January, 1955, he was again convicted and fined £100 and, having failed to pay, was sent to prison for three months. The use of the land as a caravan site had continued ever since. The Attorney-General issued a writ on the relation of the Hornchurch Urban District Council claiming an injunction perpetually restraining the defendant from using the land as a caravan site. *Held*, although the remedies provided by the Act might not have been thoroughly exhausted, the case was a proper one on its facts for the grant of an injunction: ATT.-GEN. *v.* BASTOW [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497, Devlin J. (following dictum of Buckley J. in *Att.-Gen.* v. *Ashborne Recreation Ground Co.* [1903] 1 Ch. 101).

SCOTLAND

See NATIONALISED INDUSTRIES (p. 172, above).

SUBORDINATE LEGISLATION

Judicial control

See CROFT *v.* ROSE (p. 181, below).

Parliamentary proceedings

Select Committee on Statutory Instruments (*House of Commons*). The Committee met on January 29, 1957 (H.C. 4–IV), on February 12 and 26, 1957 (H.C. 4–V, VI) and on March 12 and 26, 1957 (H.C. 4–VII, VIII). The Committee examined 157 instruments and resolved that it was unnecessary to draw the special attention of the House to them. The Committee asked Government Departments to submit memoranda in explanation of Federated Superannuation System for Universities (Pensions Increase) Regulations, 1956; National Health Service (General Medical and Pharmaceutical Services) Amendment (No. 3) Regulations, 1956; Suffolk (East and West) County Agricultural Executive Committee (Combination of Counties) Order, 1957; London Traffic (Prohibition of Cycling on Footpaths) (Swanscombe) Regulations, 1957; Coal Industry Nationalisation (Superannuation) Regulations, 1957; National Health Service (Authorisation of Subscriptions) (Scotland) Regulations, 1957.

In their Second Report, the Committee stated that in their opinion the special attention of the House should be drawn to the Coal Industry Nationalisation (Superannuation) Regulations (S.I. 1957 No. 319) on the ground that they appeared to make unusual use of the powers conferred by the statute under which they were made (H.C. 4–VIII of 1956–1957).

Special Orders Committee (*House of Lords*). In the Fourth and Sixth Reports the Committee examined four instruments. The Committee reported that none of them raised important questions of policy or principle; that all could be passed without special attention or inquiry; that two were not founded on precedent, and two were so founded (H.L. (32) & (50) of 1956–1957). In the Fifth Report, the Committee examined the Fatstock (Guarantee Payments) Order, 1957, and reported that it raised important questions of policy and principle, was founded on precedent, that it could not be passed without special attention but that no further inquiry was necessary (H.L. (44) of 1956–1957).

TOWN AND COUNTRY PLANNING

Royal Commission

In the House of Lords on February 13, 1957, Lord Beveridge moved that Oxford's traffic problem should be referred to a Royal Commission. After debate, the motion was withdrawn (201 H.L. Deb. 751–852).

See also REMEDIES (p. 175, above), TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (p. 178, below).

TRADE UNIONS

Conspiracy

In HUNTLEY *v.* THORNTON AND OTHERS [1957] 1 W.L.R. 321, [1957] 1 All E.R. 234, Harman J. gave judgment for the plaintiff against certain of the defendants in an action for conspiracy. The plaintiff was an expelled member of the Amalgamated Engineering Union and sued the defendant officials and members of the Union.

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

Committee. The Committee on Administrative Tribunals and Enquiries (Chairman: Sir Oliver Franks) has published (1) Appendix I to the Minutes of Evidence, being memoranda submitted by persons and organisations who did not give oral evidence, including Sir Carleton Allen, Q.C., Rt. Hon. Sir Edward Bridges, Mr. S. A. de Smith and Professor E. C. S. Wade; (2) four further volumes of the Minutes of Evidence; for the twenty-second day, when evidence was given by Professor Bernard Schwartz; for the twenty-third day, when evidence was given on behalf of the Law Society of Scotland, the Central Board for Conscientious Objectors, and the Farmers and Smallholders Association; for the twenty-fourth day, when evidence was given by Sir George Coldstream on behalf of the Lord Chancellor's Department, by Sir Norman Brook as Official Head of the Home Civil Service and Joint Permanent Secretary to the Treasury, by Sir John Hawton, Dame Enid Russell-Smith and Mr. J. C. Blake on behalf of the Ministry of Health, by Sir Eric B. Bowyer on behalf of the Ministry of Pensions and National Insurance and by Sir Harold Fieldhouse on behalf of the National Assistance Board; for the twenty-fifth and twenty-sixth days, when evidence was given by Sir Alan Hitchman, Mr. A. P. Marktelow and Mr. H. Gardner on behalf of the Ministry of Agriculture, Fisheries and Food, and by Dame Evelyn Sharp, Sir Harold S. Kent (H.M. Procurator-General and Treasury Solicitor) and others on behalf of the Ministry of Housing and Local Government.

Disciplinary bodies

The appeal in VINE *v.* NATIONAL DOCK LABOUR BOARD was dismissed by the House of Lords [1957] 2 W.L.R. 106 (see [1956] P.L. 11, 167–168).

Lands Tribunal

Costs. In WOOTTON *v.* CENTRAL LAND BOARD [1957] 1 W.L.R. 424; [1957] 1 All E.R. 441, the Court of Appeal held (1) that where a claimant disputed the development value fixed by the Central Land Board and took the question to the Lands Tribunal, the proceedings before the Tribunal were an "appeal"; (2) the question of the award of costs was in the discretion of the Tribunal, but an appeal to the Court of Appeal in the form of a case stated as to the power of awarding costs was not limited by section 31 (1) (*h*) of the Judicature Act, 1925, and might be somewhat more open than an appeal as to costs from the High Court; (3) the Tribunal in exercising its discretion as to costs had overlooked (a) that the proceedings were in the nature of an appeal, and (b) that on the matter of principle the appellant's view was the right one and that of the Board wrong; (4) both parties consenting, a just order would be to direct that the Board pay one half of the costs of the appellant.

Per Lord Evershed M.R.: "As a matter of administrative convenience I think it highly sensible that one party should be directed to pay the fee in the first instance; but he should, I would have supposed, be treated as paying it on behalf of the contestants and the question of the ultimate liability should rest with, and be dealt with by, the Lands Tribunal in accordance with the language of" [s. 3 (5) of the Lands Tribunal Act, 1949].

Quaere, whether r. 52 of the Lands Tribunal Rules, 1949, which puts the burden of paying the hearing fee on the claimant, was *intra vires* the rule-making powers conferred by section 3 (6) of the Lands Tribunal Act, 1949.

Local Inquiry

Housing. A county borough council made a compulsory purchase order in respect of the applicant's house and served a notice of unfitness specifying several facts as grounds, one of which was "bad internal arrangement" (which is not a ground of unfitness set out in s. 9 of the Housing Repairs and Rents Act, 1954). After a public local inquiry the inspector who had held it made his report to the Minister, who affirmed the order. On the applicant's requesting the Minister's reasons for deciding that the house was unfit, and asking for a copy of the inspector's report, he was told that the Minister was satisfied that the house was substantially as represented in the council's statement of facts, and that the applicant could not have a copy of the report. *Held*, on an application to quash the order, (1) the applicant was not entitled to see the report; (2) there were substantial defects in the house so that the applicant was not substantially prejudiced by the inclusion of an improper ground; (3) the applicant had been given, and had availed himself of, an opportunity to state his case at the inquiry; there had been no departure from the requirements of the Act nor from natural justice, and the application failed: STEELE *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT AND WEST HAM COUNTY BOROUGH COUNCIL (1956) 6 P. & C.R. 386, C.A. (following *Local Government Board* v. *Arlidge* [1915] A.C. 120; approving *Denby* (*William*) *& Sons* v. *Minister of Health* [1936] 1 K.B. 337).

Medical Appeal Tribunals

Debate on the Adjournment took place in the House of Commons on March 11, 1957 (566 H.C. Deb. 939–950).

See R. *v.* MEDICAL APPEAL TRIBUNAL, *ex p.* GILMORE (p. 171, above).

National service

Umpire's decisions. Four selected decisions by the Umpire in respect of applications for postponement of liability to be called up for service under the National Service Acts, 1948–1955, have been published by the Ministry of Labour and National Service (N.S. Code 2, Pamphlet No. 4/56 contains Decisions No. 279/56(N.S.) and 281/56(N.S.); Pamphlet No. 1/57 contains Decisions No. 8/57(N.S.) and 15/57(N.S.)).

Patents Appeal Tribunal

Status. The Patents Appeal Tribunal is an inferior tribunal to which certiorari will lie if it exceeds its jurisdiction or gives a decision which the court conceives to be bad on the face of it.

On a motion for certiorari to bring up and quash a decision of the Patents Appeal Tribunal the preliminary point was taken that certiorari did not lie in respect of a decision of the tribunal. *Held*, both the Comptroller-General of Patents, Designs and Trade Marks and the tribunal were given certain duties to perform which they must perform in a judicial manner and if they exceeded that jurisdiction or gave decisions bad on their face certiorari must lie: R. *v.* PATENTS APPEAL TRIBUNAL, *ex p.* CHAMPION PAPER AND FIBRE CO. [1957] 1 W.L.R. 248; [1957] 1 All E.R. 227, D.C.

Planning appeals

Advertisement. The Minister of Housing and Local Government stated that the total number of appeals under the Control of Advertisement Regulations in 1956 was 2,048. He gave details (564 H.C. Deb. 68, February 6, 1957).

Bulletin. The Parliamentary Secretary to the Ministry of Housing and Local Government stated an annual report of Selected Appeals Decisions would in future be published (563 H.C. Deb. 10, January 22, 1957).

Bulletin No. XII was published by the Ministry in January, 1957 (the last previous Bulletin was published in September, 1952), containing a summary of 41 decisions.

Rent tribunals

Jurisdiction. As a general rule, lodgers can, and do, come within the Furnished Houses (Rent Control) Act, 1946, s. 2 (1), provided that they have exclusive occupation of some part of the house. F. was a lodger in P.'s house. By a written agreement, in which F. was described as a "paying guest," F. stated that P. was at all times to have access to her room. F. referred the contract to the tribunal, who reduced the rent and granted F. three months' security of tenure. P. applied for an order of certiorari on the ground that the tribunal had no jurisdiction as F. was a lodger who was not protected by the Act as she did not have exclusive occupation of her room. *Held*, lodgers generally come within the Act of 1946 though they have to have exclusive occupation of one or more rooms. P.'s right to access did not prevent F.

having an exclusive right to use the room as a residence, which was the test. Therefore, the application must be dismissed: R. *v*. BATTERSEA, WANDSWORTH, MITCHAM AND WIMBLEDON RENT TRIBUNAL, *ex p*. PARIKH [1957] 1 W.L.R. 410; [1957] 1 All E.R. 352, D.C.

WALES

Council

Memorandum. The Third Memorandum by the Council for Wales and Monmouthshire on its activities has been published. The Memorandum contains reports from the Government Administration Panel, the Rural Development Panel, the Small Seaports and Harbours Panel, the Welsh National Servicemen Committee, and the Industrial Panel. (Cmnd. 53 and see next paragraph.)

Debate

The House of Commons debated Welsh Affairs on February 11, 1957, on a motion to take note of the Report of Government Action in Wales and Monmouthshire (Cmd. 9887; see above, p. 76) and the Third Memorandum by the Council for Wales and Monmouthshire (Cmnd. 53; see last paragraph) (564 H.C. Deb. 923–1039).

Development Commission

Activities in Wales. The Chancellor of the Exchequer gave details of the assistance given by the Commission and of advances made from the Development Fund since February, 1954 (567 H.C. Deb. *33–8*, March 19, 1957).

See also PUBLIC AUTHORITIES (p. 174, above).

WIRELESS AND TELEVISION

British Broadcasting Corporation

Agreement. An Agreement has been made dated February 1, 1957, between the Postmaster-General and the B.B.C. supplemental to the Licence and Agreement made on June 12, 1952.

The new Agreement provides that for the purposes of the Home Services (Sound and Television) the Postmaster-General is to pay to the Corporation (out of such aids or supplies as may from time to time be appropriated by Parliament therefor) in respect of the period beginning April 1, 1957, and ending March 31, 1960, a sum equal to 87½ per cent. of the net licence revenue, and during the remainder of the term such sum as My Lords may authorise. The net licence revenue is defined as the gross revenue from broadcast receiving licences less a sum equal to the expenses incurred by the Postmaster-General in relation to broadcasting services within the British Isles. Additional sums may be paid to the Corporation on representations by the Corporation to the Postmaster General. (Cmnd. 80).

Domestic services. The House of Lords debated the domestic services of the B.B.C. and Independent Television Authority on January 23, 1957 (201 H.L. Deb. 41–100).

External services. The House of Lords debated the external services of the B.B.C. on February 6, 1957 (201 H.L. Deb. 537–561, 564–598).

See also PARLIAMENT (p. 173, above).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial Development Corporation. The Account has been published of the receipts and payments of the Secretary of State for the Colonies in respect of the Corporation for 1955–1956 together with the report of the Comptroller and Auditor General thereon (H.C. 76 of 1956–1957).

Economic Committee. The Annual Report for 1955–1956 of the Commonwealth Economic Committee has been published (S.O. Code No. 88–510–0–56*).

Emigration. The Commonwealth Settlement Act, 1957 (5 & 6 Eliz. 2, c. 8), received the Royal Assent on February 26, 1957. It extends until 1962 the period for which the Secretary of State may make contributions under schemes agreed under Empire Settlement Act, 1922, s. 1.

Research. The reports of various colonial research bodies for 1955–1956 have been published (Cmnd. 52).

Aden

Constitutional progress. During 1956, two steps were taken to bring unofficial members into closer touch with the administration: each of the unofficial members of the Legislative Council, reconstituted at the end of 1955, was asked to take an interest in the affairs of one or more of the Government Departments: and a third unofficial member was appointed to the Executive Council. The Executive Council now consists of the Governor as President, three *ex officio* members, one official member and three unofficial members. The constitution of the Municipal Council was altered to enable that Council to elect its own President instead of his being nominated by the Governor in Executive Council (Commonwealth Survey, C.O.I., February 19, 1957).

Australia

Freedom of Interstate Trade. Professor Sawer has sent the following note: In *Mansell* v. *Beck* [1956] A.L.R. 1121 (H.C. of Australia), an attempt was made to persuade the High Court to reverse its decisions of 1939–1940 (*R.* v. *Connare*, 61 C.L.R. 596 and *R.* v. *Martin*, 62 C.L.R. 457), holding that notwithstanding the guarantee of freedom of interstate trade and intercourse in section 92 of the Australian Federal Constitution, a state might prohibit the sale of lottery tickets from other states within its boundaries, and might do so notwithstanding that the state itself conducted or licensed a lottery. The court rejected the argument that the " new direction " in section 92 interpretation which began with the *Bank Nationalisation Case* [1950] A.C. 227 required the overruling of the earlier lottery cases, though Kitto J. considered one relevant section of the Act in question invalid. The decision illustrates both the apparent logical simplicity and the policy vices of the approach to section 92 now dominant. The substantial basis of the decision is that gambling is not trade and commerce, so that the legislation did not seek to control any feature of trade, commerce or intercourse by reference to the " essential qualities " of those activities. This being so, the court was not influenced by discriminatory features of the legislation, nor by the patent fact that it was a form of " protectionism," the very policy which section 92 was mainly concerned to prevent. In view of the logical considerations on which the judgments depended, it is not easy to understand why they should, in the manner of the pre-Bank cases, have mentioned the history of legislation controlling lotteries in various countries. But the decision takes its place with the *Hides and Leather Case* (1952) 85 C.L.R. 488 and the *Margarine Case* (1955) 93 C.L.R. 55 in the line of decisions by which, having given section 92 a logical structure unconnected with its policy history, the High Court restricts the ambit of the section's operation so that it does not bear with impossible harshness on Commonwealth and State legislative authority. For applications of the current doctrine to what is conceived as " essentially " trade and commerce, see *Fish Board* v. *Paradiso* [1956] A.L.R. 1066 (Queensland compulsory fish marketing system not applicable to fish imported from New South Wales) and *Naracoorte Transport* v. *Butler* [1956] A.L.R. 1152 (Victorian transport control legislation not applicable to transport operator carrying wool from South Australian border town to Victorian destination, the wool having first been sent from Victoria to South Australia in order to evade the control system).

Subordinate legislation. Professor Sawer has sent the following note: The decision of the Full Court of the Supreme Court of Victoria in *Croft* v. *Rose* [1957] A.L.R. 148 will be of both practical and theoretical interest to administrative lawyers all over the Commonwealth, since it contains an unusually comprehensive judicial discussion of the conditions of validity of executive regulations, and the application to such regulations of some of the doctrines (such as uncertainty and unreasonableness) which have at times been held to apply to municipal by-laws. The case concerned the validity of regulations made by the Governor in Council under the Motor Car Act, 1951, providing a uniform state-wide code on the subject (which local by-laws may in certain details supplement). The operation of the regulations with respect to speed depended to some extent on the provision of lighting and signs by authorities other than the central Government, over whose policy the Governor in Council had no control, and it was mainly from this circumstance that the accused built up an attack on the validity of the regulations which succeeded on trial before a stipendiary magistrate but failed on appeal to the Supreme Court. The court considered some general questions of characterisation of laws in the case of powers given under the common phrase " with respect to," and proceeded to consider the extent to which delegated legislation must contain within its own provisions a specification of all matters which a person expected to obey the regulations would require to know. The upshot of the decision was to reject the narrowing rules of construction on which the respondent-accused relied, and to give authorities in the position of the Governor in Council a wide discretion as to the manner in which they should express their prescriptions.

Barbados

Report. The Colonial Reports 1954 and 1955, have been published by the Colonial Office.

See also **British Caribbean** (below).

British Caribbean

Federal Capital Commission. The Report of the Commission has been published by the Colonial Office. The Commission recommended the island of Barbados as the most suitable site for the Federal capital with, next in order of preference, Jamaica and thirdly, Trinidad. The Standing Federation Committee, set up by the London Conference of February, 1956 (see [1956] P.L. 176–177), having considered this Report, decided on Trinidad as the site for the capital.

Brunei

Report. The Annual Report, 1955, has been published by the Colonial Office.

Cyprus

Debates. The House of Commons debated Cyprus in Committee of Supply on February 19, 1957 (565 H.C. Deb. 217–252). The House of Lords debated Cyprus on February 27, 1957 (202 H.L. Deb. 78–118).

Statements. On March 20, 1957, the Secretary of State for the Colonies said that H.M. Government had accepted the offer of the good offices of Lord Ismay, the Secretary-General of the North Atlantic Council, in the search for an acceptable solution of the differences existing between the Governments of Greece, Turkey and the U.K. He said that if Archbishop Makarios would make a clear statement calling for the cessation of violence by E.O.K.A., H.M. Government would be ready to bring to an end his detention in Seychelles; there could be no question at this stage of his return to Cyprus (567 H.C. Deb. 392–400; 202 H.L. Deb. 668–674).

On March 28, 1957, the Secretary of State for the Colonies stated that the Government had agreed to release Archbishop Makarios and to allow him to go anywhere he chose, except Cyprus. In a statement the Archbishop had said: " I appeal to E.O.K.A. to declare the cessation of all operations, given that the British Government will show a spirit of understanding by abolishing simultaneously the present state of emergency." Of this, the Secretary of State said that while the Government could not regard this statement as the clear appeal for which they asked, nevertheless they considered that in present circumstances it was no longer necessary to continue the Archbishop's detention; there could be no question of an immediate abolition of the state of emergency in Cyprus (567 H.C. Deb. 1355–1361, 202 H.L. Deb. 873–877; see also 202 H.L. Deb. 941–947, March 28, 1957).

On March 29, 1957, it was announced that Lord Salisbury, Lord President of the Council and Leader of the House of Lords, had resigned from the Government because of his disagreement with this decision to release Archbishop Makarios " in the circumstances in which that action is being taken " (*The Times*, March 30, 1957).

East Africa

High Commission. An Order has been made amending the provisions of the East Africa (High Commission) Order in Council, 1947, relating to the officers of the High Commission, the East Africa Central Legislative Assembly, the fund for services which are not self-contained and the matters with respect to which the Assembly may pass laws (S.I. 1957 No. 423).

Fiji

Report. The Colonial Report, 1955, has been published by the Colonial Office.

Ghana

Status. The Ghana Independence Act, 1957 (5 & 6 Eliz. 2, c. 6) received the Royal Assent on February 7, 1957. It is an Act to make provision for, and in connection with, the attainment by the Gold Coast of fully responsible States within the British Commonwealth of Nations. The appointed day was March 6, 1957.

On February 8, 1957, the Secretary of State announced the publication of a White Paper on the proposed Constitution of Ghana (Cmnd. 71). These proposals were embodied in the Ghana (Constitution) Order in Council, 1957 (S.I. 1957 No. 277). The Constitution provides for a National Assembly and five Regional Assemblies. Houses of Chiefs are also to be set up in each Region with limited powers in matters of local custom and tradition. There will also be a Public Service Commission and a Judicial Service Commission. Any amendment of the Constitution requires a vote of two-thirds of the total membership of the National Assembly and on the most important clauses the concurrence of a simple majority of two-thirds of the Regional Assemblies (564 H.C. Deb. 775–778; see also 565 H.C. Deb. 605–607; 566 H.C. Deb. 181–184, *76*).

Summary of the constitution (in part).

1. Ghana is to be an independent State within the Commonwealth with

the Queen as Sovereign and with a Cabinet and parliamentary system of government of the same general type as is found in the United Kingdom and other independent Commonwealth countries.

2. The executive power will be vested in the Queen, represented in Ghana by a Governor-General appointed by Her Majesty in accordance with the conventions obtaining in other Commonwealth countries.

3. The constitution will provide that the powers and functions of the Queen and the Governor-General will, save where there is express provision to the contrary, be exercised as far as may be in accordance with the constitutional conventions applicable in the United Kingdom.

4. The salary of the Governor-General will be statutory expenditure and may not be diminished during his period of office.

5. The constitution will provide for a Cabinet of Ministers drawn from Members of Parliament and collectively responsible to Parliament. Ministers will be appointed and may be removed by the Governor-General on the advice of the Prime Minister. The Governor-General shall terminate the Prime Minister's appointment if at any time the National Assembly passes a motion of no confidence in his Government, unless within three days of such a motion the Prime Minister advises the Governor-General to dissolve the National Assembly.

6. Supreme legislative power will be vested in Parliament consisting of Her Majesty the Queen and the National Assembly. The Assembly will consist of a Speaker and 104 Members. Bills passed by the Assembly and assented to by the Governor-General in Her Majesty's name will be known as Acts of Parliament.

7. The maximum life of the National Assembly will be increased to five years instead of four years as at present. This provision will also apply to the Legislative Assembly elected in July, 1956, which will continue in being as the National Assembly. The first session shall begin within three months after the date of independence. There shall be a session of the Assembly at least once a year.

8. The qualifications for being elected or remaining a Member of Parliament will be set out in the constitution. Changes will be made in the present law to make it conform more nearly to existing practice in the United Kingdom.

9. The constitution will provide for universal adult suffrage and secret ballot as at present. Every citizen of Ghana, without distinction of religion, race or sex, who fulfils the existing qualifications shall be entitled to be registered as a voter.

10. The constitution also provides for the continuance of the existing constituencies. There will be machinery to review their number and boundaries from time to time, having regard to changes in population.

11. The constitution will provide for a Public Service Commission which will continue to function very much as at present. The existing members will, it is hoped, consent to remain in office at least until the expiry of their terms of office in two or three years' time. Thereafter future appointments will be made by the Governor-General acting on the advice of the Prime Minister. The Prime Minister has informed the Secretary of State that it is his intention to consult the Leader of the Opposition before making any appointments and that it is his hope that his successors would do the same.

12. The appointment, promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers will be vested in the Governor-General acting on the advice of the Public Service Commission with the exception of the posts mentioned in paragraph 13 below.

13. In regard to a limited class of posts in the Public Service the Governor-General will act on the advice of the Prime Minister. The posts affected are those of Permanent Secretary and of a corresponding or higher grade in the Public Service (other than the post of Attorney-General) and special overseas posts.

14. Regulations affecting the Public Service Commission will be made by the Governor-General acting on the advice of the Public Service Commission.

15. The present constitution provides for the payment of compensation to Public Officers appointed before March 31, 1954, who elect to retire from the Public Service. These provisions will be continued.

16. The post of Attorney-General will continue to be a post in the Public Service for at least as long as the present holder of this post continues in office; and the assignment of responsibility for the Attorney-General's department to a Minister shall relate only to Cabinet and parliamentary business, the Attorney-General himself retaining responsibility for initiating and discontinuing prosecutions.

17. There will continue to be, as at present, a Judicial Service Commission. It will be composed of the Chief Justice, the Attorney-General, the senior puisne judge (until Justices of Appeal are appointed when he will be replaced by the senior Justice of Appeal), the Chairman of the Public Service Commission and a person who is or shall have been a judge of the Supreme Court appointed by the Governor-General acting on the advice of the Prime Minister. Regulations affecting the Judicial Service Commission will be made by the Governor-General acting on the advice of the Commission.

18. The Chief Justice and (when they exist) Justices of Appeal will be appointed by the Governor-General acting on the advice of the Prime Minister. Puisne judges will be appointed by the Governor-General acting on the advice of the Judicial Service Commission.

19. Any judge will be liable to removal from his office on an address of Parliament carried by not less than two-thirds of all the members thereof praying for his removal from office on the ground of stated misbehaviour or of infirmity of body or mind.

20. The age of retirement of judges will continue to be sixty-two subject to permission being granted to a judge by the Governor-General to continue in office for a further specified period subject to continued mental and physical fitness.

21. The appointment, promotion, transfer, termination of appointment, dismissal and disciplinary control of judicial officers (other than judges) will be vested in the Governor-General acting on the advice of the Judicial Service Commission.

22. The Chief Justice and other judges of the Supreme Court, and judicial officers, appointed before independence day, shall continue in office thereafter and shall be deemed to have been appointed under the conditions specified in the independence constitution. Provision will be made in the constitution for the payment of compensation to overseas judges who elect to retire before the age of sixty. (The above paragraphs are extracted from Cmnd. 71.)

An Order has been made to provide that the West African Court of Appeal shall cease to be a Court of Appeal for Ghana (S.I. 1957 No. 279).

Grenada

Report. The Colonial Report, 1954, has been published by the Colonial Office.

Malaya

Status. The Report of the Federation of Malaya Constitutional Commission, 1957, has been published by the Colonial Office (see above, p. 81; and [1956] P.L. 181–182, 286). Amongst the recommendations are the following.

1. The Parliament of the Federation should consist of a constitutional Head of State, a Senate, and a House of Representatives; and Acts of Parliament should be passed by both Houses and receive the assent of the Head of State. The duration of each Parliament should be five years, subject to the power of the Head of State to dissolve Parliament at any time.

2. The Head of State should be elected for five years by the Malay Rulers from amongst themselves, and, as far as possible, the position should be held successively in order of precedence by the Ruler of each of the nine States. The Head of State should choose, as Prime Minister, the person most likely to command the confidence of the House of Representatives, and in all matters, except the dissolution of Parliament, he should be bound to accept the advice of the Prime Minister or the Cabinet (to be chosen by the Prime Minister).

3. The House of Representatives should consist of 100 members, elected by single member constituencies on a territorial basis.

4. Three of the five commissioners consider that the Senate should at first consist of twenty-two members elected by the State Legislative Assemblies and eleven members nominated by the Head of State, but that Parliament should have power to reduce the number of nominated members or to abolish nomination, to increase the number of members for each State, and to introduce a system of direct election of the State members. Sir William McKell (Australia) and Mr. Justice Abdul Hamid (Pakistan) disagree with the principle of having nominated and indirectly elected Senators.

5. The Commission unanimously agree that Senators should hold office for six years, half being elected or appointed every three years.

6. In the event of a conflict between the two Houses of Parliament, the Commission recommends that, if the Senate refuses to pass a Bill which has been passed by the House of Representatives, the Bill should become law if after the lapse of twelve months the lower House resolves that it should be submitted for the assent of the Head of State. In the case of a Money Bill the period of delay should be only twenty-one days. The lower House should not be able to overrule the Senate on a Bill for amendment of the constitution, which should require to be passed in each House by a majority of at least two-thirds of the members voting.

7. The Commission recommends that, in order to give people time to become citizens and voters, the next elections should not be held until after January 1, 1959, and that the present Legislative Council should exercise the functions of Parliament in the meantime.

8. A permanent, independent Election Commission should be set up with responsibility for delimiting constituencies, making the electoral rolls and supervising the conduct of elections.

9. At present, in many cases, legislative power is vested in the Federation, and executive power in the States. The Commission recommends that, in future, legislative power and executive responsibility should always go together. It enumerates subjects which should be Federal subjects, those which should be State subjects, and those for which there should be concurrent powers.

10. The present Supreme Court should continue and should have the functions of interpreting the constitution and protecting State rights and fundamental liberties, in addition to its ordinary functions. The Chief Justice should be appointed by the Head of State, and other judges should be appointed by the Head of State in consultation with the Chief Justice. It should be possible to remove a judge from office only on an address passed by a two-thirds majority in each House of Parliament.

11. The principles set out in the report of the London conference in 1956, regarding the establishment and control of the Public Service, should be followed. The Public Service Commission, the Judicial and Legal Service Commission and the Police Service Commission should be independent of Government control, and be responsible for appointments, promotions and discipline in these services, subject to the Government having the right to require reconsideration of any recommendations for appointment to the higher positions in the public service. The Public Service Commission should have similar powers with regard to the State public services.

12. Fundamental rights should be guaranteed in the constitution, and the courts should have the power and duty of enforcing these rights. The rights

guaranteed should be: freedom from arrest and detention without legal authority; freedom from slavery or enforced labour; and should include provisions against banishment and restriction of freedom of movement of citizens. Freedom of speech should be guaranteed to all citizens subject to the interests of security, public order or morality; and freedom to profess, practise and propagate religion should also be guaranteed. Mr. Justice Abdul Hamid, in a note of dissent, expresses the view that Islam should be written into the constitution as the national religion, but with the Federation remaining a secular State.

13. There should be guarantees against discrimination on the grounds of religion, race, descent or place of birth in making government appointments or granting entry to educational institutions or granting financial aid to pupils or students. There should be no discrimination with regard to the right to carry on any trade, business, profession or occupation and no person should be deprived of his property except under a law providing for adequate compensation.

14. The special position of the Malays should be recognised with regard to Malay land reservations, quotas for admission to the public service, quotas in respect of the issuing of permits or licences and in connection with scholarships, bursaries and other educational assistance. Present preferential treatment should remain but should not be extended. After fifteen years there should be a review of the quotas and preferences and the appropriate legislature should then determine whether to retain, reduce or discontinue them.

15. Malay should be the national language and English should be retained as an official language for ten years. Parliament should then be free to decide whether the use of English should be discontinued.

16. The language qualifications for candidates to the Federal and State legislatures should be abolished and for ten years a member of a legislature who cannot speak fluently in either Malay or English should be entitled to speak in his own language if there is a chairman who understands that language and if a record of the speech can be taken. (An abridgment of the Summary in Commonwealth Survey, C.O.I., March 5, 1957.)

Mauritius

Constitutional proposals. The Secretary of State for the Colonies announced that the Mauritius Conference had agreed on certain proposals. These were:—

1. A commission of three persons from outside Mauritius should be appointed by the Secretary of State to make recommendations, within stated terms of reference, on the system of voting and the setting up of constituencies.

2. The Governor would be enabled to appoint up to a maximum of twelve members to the Legislative Council. The Governor's choice would be at his discretion, after such consultation with members of the Legislative Council as he might deem appropriate, within the following conditions:

(*a*) nomination would not be used to frustrate the results of the elections;

(*b*) it would be used where appropriate to ensure representation of special interests of those who had no chance of obtaining representation through election;

(*c*) it might be used if desirable to assist in the working of Government. For the avoidance of misunderstanding, it should be clearly stated that " Government " in this context means a government largely composed of Ministers, and associated through them and their adherents with the Legislative Council.

3. It was agreed that the object would be for the nine unofficial seats in the Executive Council to reflect the composition of the Legislative Council, *i.e.*, any parties or elements in the Legislative Council which accepted an invitation to join the Government would be represented among the nine unofficial members of the Executive Council as nearly as possible in pro-

portion to their strength in the Legislative Council. Appointment to the Executive Council would be by the Governor in accordance with this principle and after consultation, at his discretion, with the members of the Legislative Council.

4. It was agreed that the ministerial form of government should be introduced as soon as possible and before the next elections, which were, at present, due to be held in August 1958.

5. It was the general desire of the conference that elections should be held when due, in August 1958. If, however, there were any considerable delay in the electoral commission producing its report, it was recognised that it might be necessary to defer elections:

(*a*) to enable administrative preparations for elections under the new system to be completed; and

(*b*) to give political parties such time as would be reasonable, in the Secretary of State's opinion, to rearrange their own organisations and prepare their electoral campaigns under the new constitution. (566 H.C. Deb. *115–117*, March 8, 1957.)

Nigeria

Commission of Inquiry. The Tribunal appointed to inquire into allegations reflecting on the official conduct of the Premier of, and certain persons holding Ministerial and other public offices in, the Eastern Region has made its Report (Cmnd. 51). Amongst its conclusions, the Tribunal found that the conduct of the Premier (Dr. Azikiwe) in his capacity as a Minister, in connection with the affairs of the African Continental Bank fell short of the expectations of honest, reasonable persons and that he was guilty of misconduct in failing to relinquish his financial interest in the Bank when the proposal to inject public moneys into it was first mooted (Cmnd. 51).

On February 20, 1957, it was announced that Dr. Azikiwe had stated his intention to surrender his shares in the African Continental Bank without compensation and agreed to repay to the bank the director's fees of £5,252 which were paid to him after public money had been injected into the bank, on the understanding that this sum is a debt due to him which waits to be met out of the bank's current earnings (565 H.C. Deb. *67*).

Constitutional conference. The Secretary of State for the Colonies has proposed that the postponed conference should open on May 23, 1957.

Rhodesia and Nyasaland

Report. The Colonial Report, 1955, for Northern Rhodesia has been published by the Colonial Office.

St. Vincent

Report. The Colonial Reports, 1954 and 1955, have been published by the Colonial Office.

Singapore

Conference to discuss proposals for a new constitution was formally opened on March 11, 1957.

Swaziland

Report. The Colonial Report, 1955, has been published by the Colonial Office.

BOOK REVIEWS

New Sources of Local Revenue. Report of a Study Group of the Royal Institute of Public Administration. [London: Allen and Unwin. 200 pp. 25s.]

This book is based on the assumption that local authorities ought, if possible, to be armed with some new source of taxation under their own control as a supplement to rates. With this goal in mind, a study group of the RIPA examined local taxation in a number of overseas countries. They were particularly impressed by the Swedish system of local taxation, an account of which occupies almost half of this book; in addition a duplicated supplement is available from the RIPA which gives information about local government finance in eleven other countries. The Group's proposals for Britain, however, do not closely follow any overseas' system of local revenues.

The group's most important, and controversial, proposal is for the introduction of a local income tax, some aspects of which would bear a resemblance to the " payroll " taxes levied by many American cities. The tax would be limited to a maximum rate of 3d. in the £, with no exemptions or allowances; and employers would deduct it from wages and salaries and pay it to the local authority in whose area they operated. Business and professional profits would be taxed at the same rate on the basis of assessments provided (in confidence) by the Inland Revenue, while in the interests of equity all investment income in excess of £100 would also be taxed by means of individual returns made to the local authority.

Additionally, it is proposed that the levying of entertainments tax and motor-vehicle licenses should be transferred to the local authorities. Altogether the three proposed new sources of revenue might yield as much as £270 million a year, and if accompanied by the rerating of industry and agriculture this would enable local government to raise for itself almost the whole of its financial requirements. These are therefore very far-reaching proposals, and the plan is at any rate a bold one.

The local income tax has the economic drawback of being another impost on earnings rather than on expenditure; the alternative idea of a " sales tax," also in wide use in America, is dismissed far too briefly. Also, in the interests of equity, the collection of the proposed local income tax has been made rather complicated; a simple " payroll " tax, accompanied by a separate local levy on business profits or turnover, would seem to be simpler and perhaps more feasible. Again, it should be noted that the new taxes would probably take on many of the characteristics (and drawbacks) of " assigned revenues," especially as the temptation for all local authorities to levy income tax at the maximum threepenny rate would be very strong.

However, the strongest criticism of the RIPA proposals is that they would benefit local authorities very unequally indeed. The proposed taxing authorities in each case would be the counties and county boroughs. The local income tax would be related (as explained) to place of employment, but the heavy concentration of employment in Greater London and in the county boroughs would leave the majority of the counties out in the cold. Precisely the same point holds good about the incidence of a local entertainments tax. The effect would be increase very considerably the existing disparities between the resources of local authorities. The rural and semi-rural counties would have to go on relying heavily upon equalisation grants, and this fact would, of course, weaken the whole argument for the reform, especially as the " independence " which local government enjoys as a whole tends to be governed by the position of its weakest members. It may perhaps be hazarded that a local income tax might work reasonably well if, and only if, it could be levied on a regional basis.

Of course, all possible forms of local taxation are open to considerable criticism. The strength of this study is that it does put forward some interesting proposals, and up to a point defends them ably. Its greatest weakness is the failure to examine the actual distribution and consequences of the proposed new taxes, or to meet criticisms on this score at all adequately.

PETER SELF.

LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA. Second edition by W. ANSTEY WYNES. [Sydney: The Law Book Co. of Australasia Pty Ltd. 1956. lxiv and 768. £Aust.4 15s.]

BOOKS on the Australian Constitution are few and far between. Twenty years have passed since the first edition of this work was published—under the title of *Legislative and Executive Powers in Australia.* Dr. Wynes has now made his treatise a comprehensive study of the law of the Australian Constitution by adding two very full chapters on the Commonwealth judicial power. These new chapters account for 136 additional pages of text. But the remainder of the text has been expanded by no less than 266 pages. There are 69 pages of appendices in the second edition, comprising the text of the Constitution, the Statute of Westminster Adoption Act, 1942, a list of Commonwealth territories and the general legislative provisions governing them, a bibliography, and a comprehensive index.

This, then, is a weighty book. Those who are looking for a painless introduction to the mysteries of Australian federalism would do well to avoid it. It is deliberately designed as a legal textbook, with the emphasis heavily on the Constitution in the courts. The wealth of reference to decided cases, both in the text and in the abundant footnotes, makes it safe to say that Dr. Wynes has ignored none of the judicial authorities on any aspect or provision of the Constitution, and that anyone wanting to know what the courts have had to say on any Constitutional point will find the answer in the book. There is also, for full measure, copious reference to journal articles and to United States authorities on analogous questions arising under the Constitution of that country. Dr. Wynes' concern for the practitioner is further shown by the inclusion of seven pages of " Additional Notes " bringing the case references right up to date as at July 16, 1956, and by the insertion in one of the chapters on the judicial power, at a late stage of printing, of eight pages dealing with the important decision of the High Court in the *Boilermakers' Case* in 1956, a decision against which an appeal has since been taken to the Privy Council.

Dr. Wynes' own view of the Constitution in general and of the judicial function in relation to it is impeccably orthodox, though he has not hesitated to be critical of the opinions of particular judges on particular points. He makes it quite clear that he is a disciple of Dixon C.J. in the Chief Justice's view of the function of the High Court, as expressed by him on assuming office in 1952: " It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism." Indeed this statement by the Chief Justice, together with other sentences from his speech on that occasion, is accorded a place of honour on the back of the title page, in company with two extracts from Magna Carta. Dr. Wynes wholeheartedly supports the High Court in its usual rejection of any appeal to what he calls " political, sociological, economic, or equally vague and ill-defined standards." In his view " legal and logical reasoning supplies some objectivity," and the Constitution has worked remarkably well because of the court's adherence to the methods of the common law. This may well be true—as far as it goes. But less orthodox critics may believe that Dr. Wynes overstates the case for traditional "legal reasoning." The success of the Constitution in practice is due in no small degree to the exercise by the court of what has been called judicial statesmanship, involving a recognition of the high political considerations at stake in particular cases. The history of the interpretation of the Federal Parliament's power to legislate for defence and for conciliation and arbitration of industrial disputes extending beyond the limits of any one state amply demonstrates that fact. True, these broader considerations are rarely mentioned in the judgments (Isaacs J. provided many exceptions—in this respect Dr. Wynes would not approve of him). But it might be thought that judgments would often be the better if they were, and that the confusion produced in some parts of the law of the Constitution—section 92 (freedom of interstate trade, commerce, and intercourse) may be cited as an example—might have been avoided by a less meticulous adherence to traditional legalism.

Dr. Wynes' insistence on the exclusive importance of this legalism and of the judicial record results in his presenting a very lop-sided view of the Constitution. Thus his chapter on "The Commonwealth and the States Inter Se," a vital chapter in a treatise on a federal constitution, makes no mention of the Financial Agreement or the *Uniform Tax Case.* In fact nowhere in the book does there appear to be any discussion of the scheme of the Financial Agreement. And although the actual decision in the *Uniform Tax Case* is discussed briefly in various places, no hint is given of its vital importance in the federal scheme of things. Of course practising lawyers are not likely to be directly concerned with these matters, but to ignore them is to preclude a full appreciation of the Constitution.

Dr. Wynes makes some curious statements. On p. 521 he says: "The 'Commonwealth' and the several 'States' of Australia are, in strict legal theory, non-existent . . ." This is surely nonsense in view of the many references in the Constitution to the Commonwealth and the states as political entities endowed with rights and duties and powers. The author is discussing the application in Australia of the British legal concept of the Crown, and he goes on to deal competently with the problems this has created in a federal system. But the proposition quoted is not at all helpful and may be quite misleading. On p. 28, he points out that the Australian Constitution has no group of provisions designed to secure individual rights and liberties like the Bill of Rights provisions of the U.S. Constitution. It is open to question whether "we are undoubtedly as well protected under our own system which in this respect follows British precedent." But surely he is a brave or a blind man who can say: "Power is rarely exercised in an arbitrary manner where it is unlimited in extent . . ." On p. 33 a distinction is drawn between the nature and the extent of a legislative power: "In truth the meaning of the terms of the Constitution does not undergo any change, for the nature of a grant of power remains always the same; . . . while the power remains the same, its extent and ambit may grow with the progress of history." There is judicial authority for this sort of statement, but it is not apparent what value is to be derived from it.

One or two other particular points of criticism may be made. The publishers of the book also publish the Australian Law Journal, but that does not seem to be a good reason for those recent cases which have not yet reached the Commonwealth Law Reports to be consistently referred to only in the A.L.J. reports, without the Argus Law Reports reference being given as well. Literal errors in the following words were noticed, apart from those mentioned in the page of corrigenda: "phrases" (p. 20, line 12), "it" (p. 34, 4th last line), "surrendered" (p. 162, line 3), "Prerogative" (p. 514, line 14).

One may well quarrel with many of Dr. Wynes' views on particular questions. One may believe that he has indulged unduly in lengthy discussion of particular cases, and that judicial pruning could have reduced the book to a more manageable size. But further criticism in a review of this nature would be carping. Sincere tribute must be paid to Dr. Wynes' great industry. His book must become the standard legal textbook on the Australian Constitution and will no doubt remain so for many years. No practitioner and no serious student of the Constitution can afford to ignore it, though it is to be hoped that the diet will be relieved by readings from other sources.

ROSS ANDERSON.

INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS. By WALTER GELLHORN. The Edward Douglass White Lectures on Citizenship. [Louisiana: Louisiana State University Press. 1956. viii and 215 pp. (including index). $3.75.]

PROFESSOR Gellhorn of Columbia University, New York, was invited by the Lousiana State University to deliver the Edward Douglass White Lectures on Citizenship in 1956. This book is based on those lectures, although much of the material of Chapter II, which concerns restraints on book reading, is drawn from an earlier study commissioned by the National Book Committee, in which Professor Gellhorn collaborated with Professor Richard McKeon of the University of Chicago and Professor Robert Merton of Columbia University.

Chapter I, entitled " Changing Attitudes Towards the Administrative Process," discusses the remarkable exchange of roles which has occurred in recent years between the defenders and the detractors of the administrative process, side by side with which there has developed a healthy realisation, by many persons previously enthusiastic about it, of the limitations on the administrative solution of governmental problems. Professor Gellhorn describes how among progressive and liberally minded persons the starry-eyed support of the New Deal has given place to practical concern over the effects of the recent security and loyalty programmes, the new curbs on literature and the right to work, and similar developments, while those who so vigorously opposed the administrative excesses of the New Deal legislation now seem content to exceed by a long way the extent to which the New Deal entrusted discretion to the executive by way of administrative process.

The author says that it is not his purpose " to criticise or to characterise those who now find elements of safety in governmental methods they formerly condemned " (the new " radicals," as he calls them), but rather " to sketch why some of the former upholders of the administrative process . . . now feel that what were mainly imaginary dangers have become real—and frightening " (pp. 18–19). He proceeds to marshal the arguments which compel the new " reactionaries " to protest against the abuses and dangers which are inherent in the new procedures governing loyalty and security tests, the test of obscene literature, the deportation of aliens and other matters, which are the dominant features of the present-day administrative scene. The story as unfolded by Professor Gellhorn is indeed an alarming one, and the author's conclusion that " the new radicalism has given approval to powers that tunnel into the bedrock of individual security far more deeply than has been customary " (p. 29) cannot be lightly brushed on one side.

With regard to restraints on book reading, the subject of Chapter II, there is the familiar complaint about the judgment of Cockburn C.J. in *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, which established the test of obscene libel as the tendency of the matter complained of to deprave and corrupt those whose minds are open to such immoral influences and into whose hands the publication may fall. It may be a little unfair to describe Cockburn C.J. as believing " that words, phrases, or passages could be lifted out of context and then considered as abstractions to determine whether their tendency is to 'deprave and corrupt,'" which is how Professor Gellhorn describes the position (p. 54). It is true that the law has been so interpreted in individual cases, but it is unlikely that Cockburn C.J. intended this, and present practice is not so strict. In the United States it would seem that unofficial censorship arrangements go very much further than anything we have understood exists in England, although little is known here about this aspect of restraints on book reading. Professor Gellhorn makes some good points about the difficulty of identifying obscenity: "In reality, . . . the word does not refer to a thing so much as to a mood. It is a variable. Its dimensions are fixed in part by the eye of the individual beholder and in part by a generalised opinion that shifts with time and place" (p. 55). Also he roundly condemns the belief that what one reads influences one's immediate behaviour. "Far from discovering that delinquency grew out of reading, the clinicians have discovered that among New Yorkers it is more likely to grow out of inability to read" (p. 63). The degree to which customs officials and the post office authorities attempt to control the entry of propagandist literature into the United States is interesting, even the London *Economist* having been condemned on one occasion in 1955. Isolated instances do not establish the general picture, however, as Professor Gellhorn would be the first to admit. There is much force in his contention that individuals should be allowed to do their own discarding into waste-baskets. Professor Chafee's belief in the jury as a tribunal to decide what books are unlawful is not altogether shared by Professor Gellhorn, but it is difficult to accept his view that while a favourable jury finding should be respected by an appeal court, there is no need to accord the same degree of finality to an adverse finding (pp. 97–98). There is nevertheless much practical wisdom and a great deal of useful information in this chapter.

Chapter III deals with the right to make a living. A full review of its contents is not possible here, but it may be said that the picture drawn concerning the degree to which entry into various occupations has been made subject to strict control by those already engaged in those occupations makes the English scene appear like a paradise ordained by Herbert Spencer in comparison. It would seem that occupational licensing has gone too far in the United States.

In his brief epilogue, the author sums up the contents of the previous pages. "They reflect," he tells us, "a mounting legislative and administrative insensitivity to the dignity of man as an individual. They show a revival of readiness to hobble minds under the guise of mending morals. They depict the gradual closing of the occupational doors through which energetic Americans have traditionally been free to pass in pursuit of their ambitions" (p. 152). Yet Professor Gellhorn is careful to point out that the situation is not so sombre as might be thought from a recitation of particular instances, and that "catastrophe is not on our doorsteps—or even just around the corner." His book, he emphasises, deals with defects, not disasters, with flaws, not failures. It is to Professor Gellhorn's great credit that he sounds the alarm so emphatically, and yet does not create panic.

J. E. HALL WILLIAMS.

PUBLIC LAW

Autumn, 1957

COMMENT

THE news that the Prime Minister has asked "a small group of Privy Councillors with long experience of the House of Commons" to consider the problem of The Burden on Ministers will cause widespread relief among right-thinking men and women throughout the Commonwealth. It is doubtful, however, whether anyone else will be much impressed. Admittedly, the approach is tentative. The Privy Councillors—three of whom (Lord Attlee, Lord Crookshank and Mr. Clement Davies) have more or less laid down The Burden—are to give only "preliminary study"; their inquiry is to be "informal" and the Prime Minister has asked them to report so that he can consider "whether a more formal type of inquiry would be profitable." The Prime Minister has, it appears, been moved by "Questions in the House," by "some discussions in the newspapers" and by the fact that "in recent years there has been a heavy casualty list among distinguished right hon. Members on both sides of the House." The apprehension is clearly widespread. The time may not yet have come for something to be done. But it has clearly come for some Privy Councillors to consider (informally) whether some thoughts (preliminary) might not be given to the idea that another inquiry might be made. In a matter of this solemnity, the Prime Minister is right to move cautiously and with some ceremony. Ministers, as we know, bear The Burden manfully; they shoulder it, they carry it forward and eventually they lay it down or, if given to rhetoric, hand it on. Their duties they accept not for personal advancement, monetary gain or (least of all) love of power, but because they recognise that the Queen's Government must be carried on. They are the Duke of Wellington's Own.

This is all very well. But we are not clear why Ministers alone should, so to say, scoop the pool on Privy Councillors in this matter of burdens. In the House, a Member asked whether the Prime Minister would consider allowing the small group to look at the burden on Members of Parliament after it had dealt with the burden on Ministers, Mr. Macmillan replied "Yes, Sir" but whether he meant he would consider it or would give this further scope to the inquiries was not clear. But why stop at Members? What about The Burden on chairmen of companies, trade union officials and aldermen? One must beware of reducing the categories to absurdity and so must exclude those who actually work with their hands. But still it is clear that more than Ministers have a claim. A number of *ad hoc* bodies will not long suffice. A Public Commission is called for. Or a series of regional boards—parallel to those for industry. And so it will proceed along the traditional corridors of British development until that great day when a door at the end carries the proud inscription: the Minister for Burdens.

The fear of overwork has long worried those at the top. In 1846, after the defeat of the Government, Peel told Gladstone that nothing would ever induce him to take office again. He spoke of the immense multiplication of details in public business; he said that the mass of public business increased so fast that he did not venture to speculate even for a few years on the mode of administering public affairs and he thought the consequence was already manifest in its being not so well done. Presumably, the details have gone on multiplying in the last one hundred and eleven years. Presumably, this has not in fact resulted in an equally continuous running down of public affairs. So perhaps things are not in fact quite so bad as they are imagined. Or no worse than they have been for a long time. Yet improvement could be made, without furrowing the brows of Privy Councillors. We are surely suffering more and more from a hardening of the social arteries. The pomposity of public life is increasing. Politicians and others are constantly being called upon to perform a multiplicity of formal actions which have very little to do with what they are paid for. Ceremonials which have no particular meaning or traditional value abound. Must so many foundation stones be laid, so many strings severed across new entrances, so many keys fitted into gates and doors, so many social functions tediously declared open? There is little enjoyable pageantry attached to these affairs. Most are dull and only enlivened when something goes wrong or some child suddenly notices that the Emperor has no clothes. Must there be so many public dinners and so many empty Ministerial speeches with so many calculated indiscretions? We cannot imagine that Ministers enjoy these farcical parades. Why do they continue and multiply? There seem to be two reasons. One is that, occasionally, money can be raised (sometimes for good causes, sometimes for Party funds). The other, and more common, is that they provide satisfaction for local citizens who have been connected with the enterprise of which they mark the completion. Places on the platform are prized; the select meeting with the Great Man, before or after the ceremony, is the social height. Must so much money and time be spent to gratify this pathetic snobbery?

For the alternative may be serious. A Member put it to the Prime Minister that the House of Commons would resent it very much if Ministers became less answerable to the House and put in fewer appearances. At the moment, the time of Ministers is divided between their job of running Departments, their appearances in Parliament and their out of doors activities. It is these last which must be diminished if the days are too full. Sitting on the Front Bench must often seem an intolerable waste of time. But so must sitting at the back. Yet they are vitally important functions. That Burden must continue to be borne. And if Ministers have to choose between mingling with Members and mingling with a more enthusiastic and illusioned section of social aspirants, we hope they will remember to whom their constitutional responsibility is owed.

PARLIAMENT is showing itself as vigilant as ever in the protection of civil liberties. The tremendous value of this talking-shop is that anything of sufficient importance is published at once and fully. And if the Government has a hand in it somewhere, then the happening will be broadcast to the ends of the earth or at least as far as men and women can be found to pay for the information. Civil liberties are good news value.

One very peculiar and dangerous argument began to emerge when the Home Secretary was being questioned about inquiries in the Universities (see below, p. 255). It will be remembered that in November, 1955, a Conference of Privy Councillors was asked by the Government to examine security procedures. In the statement issued after their Report had been received, they concluded that there was " nothing organically wrong or unsound " about the Government's security arrangements. They proceeded to make various recommendations all of which the Government accepted. To say that there was nothing organically wrong or unsound was, we would have thought, a fairly unambiguous, if not particularly helpful finding. It meant, surely, that the arrangements were not radically bad; that the general structure was right and sound and so there was no need to scrap everything and begin anew. It did not mean that there was nothing wrong; it meant that there was nothing wrong with the organism, as a petrol engine may be sound though it is missing on one cylinder.

Now when the Home Secretary was asked about University inquiries he said that although he could not disclose the nature of the arrangements in the Universities, he could say that no significant changes or extensions had been made in the last twelve months. He went on, after another question: "There is no need to exaggerate the position. I have simply informed the House that we are following the practice which was approved by the Conference of Privy Councillors which, the House will remember, concluded that there was nothing organically wrong or unsound about the Government's security arrangements." Mr. G. R. Strauss who had been a member of the Conference of Privy Councillors pointed out that the Conference "did not go into this aspect of the problem at all and did not consider the detailed arrangements for security in universities." Mr. Butler replied: "The Conference approved the general outline of our arrangements and . . . the arrangements have to be applied wherever they are necessary." The argument seems to be emerging thus: the Privy Councillors found nothing organically wrong; this means they have approved the general outline; if therefore the Government is doing something which it was doing at the time the Privy Councillors investigated, that was something approved by the Privy Councillors. So to find nothing organically wrong is to find everything in detail right and the Privy Councillors can be set up as giving an authoritative *carte blanche*.

When the matter was further debated the next day, the Joint Under-Secretary of State for the Home Department (Mr. J. E. S. Simon) repeated the Conference finding of "nothing organically wrong." Mr. Strauss intervened again to say that that conclusion of the Privy Councillors was the answer to the question "Are the existing security arrangements adequate or should they be fortified and strengthened?" Mr. Strauss said: "Our reply was, 'No, they should not be fortified and strengthened. They are adequate to deal with the problem.' That does not mean that we went into every detail to see whether it offended against civil liberty. We did not do that. The quotation the Joint Under-Secretary has just made was in reply to the question whether more powers were necessary." Mr. Simon said he accepted this but he noted that the Conference made certain recommendations to strengthen the system. Then he said: "Looking at the very distinguished names of the gentlemen who constituted that Conference, I cannot believe that if there were a real menace to civil liberties in the arrangements made they would not have said so." This is a new step. For now the fact that there was nothing in the Conference Report about a particular aspect of the way in which the security arrangements worked becomes evidence that those arrangements contained no real menace to civil liberties. But we do not know what was in the Report or what was said. We have only the statement, which was not the Report. More importantly, the Privy Councillors could have investigated only a small part of the arrangements or only to a certain depth. We know they did not discuss the Universities in detail. Therefore surely nothing coming out of the Conference can be relevant to the particular and detailed administration of the general arrangements applied to the Universities.

There are at least two morals to this story. The first is: general conclusions on the generally sound functioning of a security system are irrelevant as an answer to particular charges of a breach of civil liberties. And the second is: do not let Governments appoint little groups of Privy Councillors to make investigations unless this is the only alternative to no investigation and some investigation is necessary; for if you do, they will provide good cover at a time when Governments would be better exposed. It is better that Governments should keep their own houses clean and be clearly responsible for any dirt than that they should get in outside help or even, as with The Burden, put the whole job out to contract.

The Report of the Committee on Administrative Tribunals and Enquiries (Chairman: Sir Oliver Franks) was published in July, 1957 (Cmnd. 218). Detailed consideration of this important paper must be postponed to a later issue. Among the Committee's main recommendations are: that there should be established two standing Councils on Tribunals, one for England and Wales (appointed by and reporting to the Lord Chancellor), and one for Scotland (appointed by and reporting to the Secretary of State for Scotland) to keep the constitution and working of tribunals under continuous review; that chairmen of tribunals should be appointed by the Lord Chancellor (in Scotland, the Lord President of the Court of Session or the Lord Advocate) and members by the appropriate Council on Tribunals; that chairmen of appellate tribunals should always, and other chairmen should ordinarily, have legal qualifications; that the Councils on Tribunals should formulate detailed rules of procedure for each tribunal; that appeals on points of law should lie to the courts from tribunal decisions, except those of the National Insurance and Industrial Injuries Commissioners and the National Assistance Appeal Tribunals which should remain subject to review by certiorari; that no statute should contain words purporting to oust the remedies by way of certiorari, prohibition or mandamus; that departmental inspectors holding enquiries should be placed under the control of the Lord Chancellor; that inspectors' reports to Ministers should be published with the Ministers' decisions after an opportunity to propose corrections to inspectors' finding of facts.

Lord Silkin disagreed on two points. He wished the corps of departmental inspectors to be appointed by and retained under the

Minister of Housing and Local Government as at present; and he wished the reports of inspectors to remain confidential and not be published.

SEPARATION OF JUDICIAL POWERS IN THE AUSTRALIAN CONSTITUTION

In *Attorney-General* v. *R. and Boilermakers' Society* (*The Boilermakers' Case*) [1957] A.C. 288 (see below, p. 278), the Judicial Committee of the Privy Council has affirmed the majority decision of the High Court of Australia. The result is to establish for the Australian system an extremely rigid two-way separation of judicial power in the federal sphere. The Commonwealth is restricted to the area of judicial power mentioned in Chapter 3 of the Constitution, may vest such power only in " courts " complying with the requirements of sections 71, 72 and 77 (iii) of the Constitution, and may not vest " non-judicial " powers in such courts, save non-judicial powers which are strictly incidental to (or perhaps traditionally associated with) the exercise of judicial powers by courts. The reasoning which prevailed is a striking example of the mixture of semantic inference and political theory now dominant in both tribunals. The Judicial Committee opinion is a *tour de force* of judicial rhetoric, skilfully combining the logical structure of the constitutional documents, traditional conceptions of the nature of judicial power and assumptions about its " essentially " distinct character, and pragmatic considerations as to the desirability in a federal system of preserving a strict isolation of the judiciary from the contaminations of policy administration; the effect is to produce a feeling of inevitability. Actually the inferences drawn are at best probable. It would be easy, taking each step in the reasoning point by point, to show that a contrary inference could have been drawn, so as to reach the conclusion of the dissenting minority in the High Court. This, however, would now be a fruitless exercise, since the Judicial Committee has spoken; it will be for the Australian Parliament and courts to do what they can in order to reconcile the practical work of government with this further instalment of a rigid constitutional law of conceptions, to whose creation a majority of the present High Court and Judicial Committee are dedicated.

The specific question in the case was whether the Commonwealth Court of Conciliation and Arbitration could validly be invested with both the power to make industrial awards, and the power to interpret and police the system of industrial norms so created. From 1904 until 1956 it had been assumed that such a mixture of functions was constitutional, and an elaborate structure of industrial tribunals and laws had been built up accordingly. In practice, the making and the administration of such highly " concretised " norms as industrial arbitration awards can most efficiently be carried out by the same individuals working within the one organisation. The first three justices of the High Court indeed thought that the making of an industrial award was a discretionary act falling more within the penumbra of judicial than of legislative function; since 1918, the accepted High Court doctrine has been that making awards is predominantly " quasi-legislative," but the Court has nevertheless insisted that awards are not themselves " laws of the Commonwealth." Nothing in the semantic structure of the Constitution either directly or by probable inference prohibits the same *persons* from being appointed members at one and the same time of a judicial body and of a non-judicial body. When the Court of Conciliation and Arbitration was performing its judicial functions, its members knew very well how to reorient their procedure and outlook accordingly. In any event, most jurists and political theorists today consider that adjudication is distinguishable only by considerations of degree, not of essence, from legislation and execution. Having regard to this long history, to the equivocal character and practical needs of the arbitral function, and to the presumption of constitutional validity (which, however, may have disappeared from the jurisprudence of the High Court and Judicial Committee) it might have been a more responsible decision to let *this* mixture of judicial and other functions stand.

The Commonwealth Parliament has in fact by the Conciliation and Arbitration Act, 1956, adopted a solution of the particular problem, in advance of the Judicial Committee decision; it has set up an " Industrial Commission " which performs the award-making functions of the former Court of Conciliation and Arbitration, and an " Industrial Court " which performs the award-policing functions, and it has appointed separate persons to these two bodies. This has already been found unsatisfactory in practice. The judges of the Industrial Court are inadequately occupied; those with industrial experiences may lose, and those without it never acquire, the intimate feeling for industrial relations necessary to the proper discharge of their functions, a feeling best developed by participation in the award-making function. Would it be consistent with the decision in the *Boilermakers'* case to appoint Mr. X as *both* a judge of the Industrial Court *and* a member of the Industrial Commission? (From 1906 to 1926, Higgins J. was both a Justice of the High Court and the President of the Court of Conciliation and Arbitration, but of course that may be another retrospective unconstitutionality.) If such a course is unconstitutional, it can only be by a direct inference from the political theory of separation of powers—a theory which obviously attracted the Judicial Committee and influenced its opinion, but which it was reluctant to adopt as an explicit major premise of its reasoning. If such a course is constitutional, then this part of the judge-made law of the Constitution can be mocked, notwithstanding the Judicial Committee's warning against such mockery.

Important points dealt with by the Judicial Committee in dicta are as follows. The Board approved earlier High Court decisions which hold that the Australian Constitution does *not* establish a separation between legislative and executive power, and does not prevent Parliament from delegating wide legislative powers to executive bodies. On this point, the Board regarded the semantic inferences supporting separation of power as overborne by the traditions of British government, and by the practical consideration that Parliament can retain effective control of the legislative power which it delegates. The Board considered whether judicial power under the Constitution is so narrowly defined and isolated that courts created for federal-state purposes (such as the High Court) cannot be employed in relation to Commonwealth Territories, which section 122 of the Constitution places under the Commonwealth Parliament as in a unitary system; the Board said that probably such courts *can* be used in relation to the Territories, and the reasoning even suggests that there they can be used for non-judicial purposes, which to some extent contradicts the policy basis of the main decision. The Board once again said that a question whether a power is exclusively vested in the Commonwealth is not "*inter se*" within the meaning of section 74 of the Constitution. In the *Nelungaloo Case* (1952) 85 C.L.R. 545 the High Court endeavoured to explain away previous Judicial Committee dicta to this effect, since actually questions of exclusive power constitute the plainest kind of *inter se* issue; no such explanation is available here, but perhaps the High Court will be able to treat the Board's *gaffe* as an unconsidered passing reference.

G. SAWER.

THE EXPANDING COMMONWEALTH

THE formation of a new group on Commonwealth affairs is always of interest and we asked Mr. H. F. L. Turner, M.P., Independent Conservative Member for Oxford City, to send us a short note on the Expanding Commonwealth Group. Mr. Turner writes:

The great thing about the Commonwealth is that it is sufficiently elastic in structure to be adaptable to changing conditions; and what used to be spoken of as the British Empire became in time generally known as the British Commonwealth and now is referred to as the Commonwealth of Nations. The existence of this Commonwealth in a complex world dominated by two very powerful groups of nations is the greatest and perhaps the only hope for peace and stability in the years that lie ahead. The symbol of unity is the Crown and the British are today very conscious of another Elizabethan Age which may well mean peace abroad and prosperity at home.

Often, as we look at the powerful Communist bloc of countries on the one hand or the immensely wealthy U.S.A. on the other, we tend to forget that the Commonwealth numbers no less than 630 million people and is therefore numerically very much larger than either of these other groups. All the scattered Dominions, Republics and Colonies are held together by a common but nevertheless sincere recognition of the Crown which, as events during the past two world wars have shown, is not just an academic emblem but a rallying point for great and small members of the Commonwealth. Even during the unsettled period which followed the conclusion of the Second World War all countries, with the exception of Burma, elected of their own free will to remain within the Commonwealth and there are many grounds for supposing that Burma might well choose to rejoin a society where her membership is missed and needed. Certainly India and Pakistan, though independent sovereign States, are proud of their Commonwealth membership and contribute in many ways to it.

But a Commonwealth must either expand and grow or shrink and die and, if it is to grow, then it must attract to its membership other uncommitted countries to share our ideals and standards. There are at least half a dozen such countries in Europe and Asia who have already approached the United Kingdom to sound us on the subject.

The emergent States from within the Commonwealth are gradually attaining full membership and will be represented at Commonwealth Conferences at all levels. We have recently seen this come about with Ghana and it is only a matter of months before the Caribbean Federation will be in a position to state whether or not she will wish to join the Commonwealth.

Apart from this growth within, there is the need to make the Commonwealth such an attractive organisation that other sovereign States, some of them kingdoms, some republics, will wish to join us. I think that this partnership is better suited in these dangerous times than a supra-national or federal system and if it should develop its very real resources, it will not only create a third interest but will balance the two great Empires which threaten to divide the Globe. Capital could be generated to develop home and overseas resources, promote trade, achieve a sound balance of payments and furnish the sinews of defensive and diplomatic power.

It has always perhaps been a part of the British genius in overseas development to be guided by realism and practical considerations rather than by theory, and what might be a suitable means of government for the fortress States like Gibraltar and Hong Kong, might be considered quite unsuitable for Singapore or the Rhodesias.

There is no desire on the part of those of us working in the Expanding Commonwealth Group in the House of Commons to cut across the various regional defence arrangements, such as N.A.T.O. or S.E.A.T.O., nor to affront in any way our American allies. Nor is there an agreed formula as to how an expanding Commonwealth could best strengthen the sterling area. The great Dominion of Canada is not in the sterling area at all. On the other hand, it will readily be seen that, if there is to develop a customs union in Europe which involves for example the French Union as well as British Africa, the task of strengthening the sterling area would be made very much easier and more workable if France and the French Union were members of the Commonwealth.

Economists naturally differ in their views on the £ sterling, but I would submit that it is ultimately in our interests first to free the £ and then lead to convertibility. The danger of doing this has always been assessed on the basis that our gold and dollar reserves must reach a certain figure before any measure of convertibility can be attempted and I suppose that is an orthodox view. A more revolutionary approach to the problem and one which I advocate is that of letting the £ find its own level and, though there might well be a run on sterling if the £ was appreciably freed, that would not necessarily be a bad thing. The £ would settle down at its true value in relation to the dollar and a self-contained economy would prove resilient and strong. This would be further strengthened if other uncommitted countries were able to join the Commonwealth.

Lord Chandos recently said "Now is the time for greatness." This bold and imaginative idea of a third interest centred on an expanding Commonwealth under the aegis of our Queen could put "Great" in front of the word "Britain" once more and might ensure, for at least a quarter of the world and its inhabitants, an era of prosperity.

H. F. L. TURNER.

THE PRINCIPLES OF STATE INTERVENTION

A CONSERVATIVE VIEW

T. E. UTLEY

GENERAL PRINCIPLES

NEITHER of the political parties in Britain has a consistent tradition in favour either of strong central government or of personal or group freedom within the State. Taking the generally accepted view that the modern Conservative Party is the spiritual heir of the Tories and the modern Labour Party, at least to a predominant extent, the spiritual successor of the Liberals, Right and Left seem, in the twentieth century, to have changed sides in the controversy about the individual and the State. Mid-nineteenth-century Toryism had on the whole a bias towards authority, while the Liberalism of the same period was strongly, and often dogmatically, in favour of freedom; the political motto of twentieth-century Conservatism is private enterprise and, in spite of recent restatements of the Socialist creed, the distinguishing mark of that gospel is still its advocacy of Governmental direction of the nation's economic life. Neither political party has, of course, in practice ever pursued any consistent set of principles in this matter, and all general statements made by politicians about freedom must be assumed to have tacit reservations. The exigencies of party debate under democracy oblige all parties to express their programmes in terms of clear-cut and manifestly indefensible generalities; their principles are therefore not to be taken literally but to be seen as shorthand symbols indicating the general line of policy currently in favour.

Furthermore, both political parties in Britain share up to a point a common inheritance, including such fundamental institutions and beliefs as government by discussion and consent, the common law, and the doctrine of equality before the law. Each gives its special interpretation to these institutions and beliefs, and each, as a compulsory part of the courtesies of debate, habitually accuses the other of neglecting or despising them. The Liberal group in recent years has assigned to itself among other noble duties the task of acting as a guardian of this constitutional inheritance, and as a seminal influence in favour of freedom on its two larger rivals; this role is

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in some ways made easier for it by the fact that its membership includes representatives of all known interpretations of the nation's political and constitutional traditions. In this analysis, it will be convenient to contrast Conservative views on the limitation of public authority on the one hand with contemporary Socialist opinions and on the other hand with the pure word of Liberalism as generally believed to have been preached in the middle of the last century.

Assuming the qualifications stated above, several distinctive and more or less continuous marks of the Conservative approach to this question may be discerned, though it will be found that they frequently point in opposite directions, and that they absolutely preclude the use of the words " libertarian " or " authoritarian " to describe the Conservative view.

In order of historical origin, the first of these characteristics is the tendency to attribute an exalted moral purpose to the State. In spite of the considerable element of scepticism in English Conservatism, the view that the State has a broadly spiritual purpose has played a large part in the evolution of Conservative ideas, and still has a discernible influence on Conservative policy. The traditional connection of the Tory Party with the Established Church is of course the greatest historical instance of this. Earlier in the century, the Conservative Party's struggle to maintain denominational education, with a bias in favour of Church of England schools, showed the same influence at work; later on, the Butler Education Act, chiefly Conservative in inspiration, made the attempt to maintain religious influence over education by providing non-denominational forms of worship and instruction in schools. The idea of the moral purpose of the State, however, is on the wane, and its contemporary influence on major political controversies is negligible. Its effect may still be seen in many of those minor debates which are conducted with the party Whips off. Disputes about Sabbatarianism and the punishment of homosexuals, for example, tend to find the political Right on the side of maintaining traditional restraints, and the political Left on the side of treating religion and sexual behaviour involving no breach of consent as matters beyond the range of public authority. It is also observable that, although the notion of the intrinsic moral quality of punishment has been formally abandoned by all participants in discussion of the penal code, it still has a lingering effect on Conservative thinking, and no doubt explains the indifference of the Conservative mind to many purely statistical arguments on the subject. The doctrine that the State exists to assist the development of the individual's character, that it is there, to use the words of the Book of Common Prayer, for the " punishment of wickedness and vice " and the maintenance of " true religion and virtue " must therefore be included among the distinctively Conservative characteristics for which we are looking. It has certainly had little influence on the political philosophies of dissent.

A feature of far more practical importance, however, is the influence of the idea of prescription on the Conservative notion of the functions of the State. Disraeli's famous aphorism " to the Liberalism which they profess I prefer the liberties we enjoy, and to the rights of man the rights of Englishmen " gives rhetorical expression to this doctrine.

All political parties in Britain have developed their views on freedom under the shadow or illumination of the principle of parliamentary sovereignty. The omnicompetence of Parliament is habitually assumed as a constitutional necessity; this necessity, however, is accepted subject to the equally unanimous reservation that the limits of law are not co-extensive with those of morality, and that there are, therefore, things which Parliament can legally do which it would be morally intolerable for it to attempt. The source of these moral limitations on parliamentary sovereignty is matter of philosophical dispute, but these remote debates have powerfully influenced the vocabulary of party controversy. Very generally speaking, the political Left in Britain uses arguments and symbols drawn from the theory of natural right when seeking to limit the power of the State; the political Right, on the other hand, is suspicious of these universals and looks to tradition and established custom as the proper brakes on public authority.

At its lowest, the doctrine of prescription means that where a right has been established by law or custom for a long time it should only be abolished or modified with great circumspection; the arguments usually adduced for this view are that change is in its nature painful whereas its consequences are unpredictable, and this is often supplemented by the view that institutions with a long history behind them will be found on examination to perform functions in the economy of social life which are indispensable, though the reasons for them are not immediately accessible to rational inquiry conducted under the limitations of political debate. To this is added the humane and utilitarian consideration that a subject who loses a right to the enjoyment of which he is accustomed probably suffers a loss disproportionate to the gain which may be achieved by conferring a right on someone who has not had it before. This last aspect of the doctrine of prescription has, indeed, achieved acceptance outside the ranks of Conservatism, and is responsible for the adoption by the Labour Party of the principle of compensation for the nationalisation of industry.

Another by-product of the idea of prescription is the Conservative habit of thinking of politics in terms of the reconciliation of classes and interests. The Conservative mind reacts against the view that, for legislative purposes, individuals may be regarded as abstract and uniform entities; it is persuaded that the preservation of freedom is to be pursued by an infinite series of compromises between one body of established interests in the State and another, —between Capital and Labour, Agriculture and Industry, and so on. In the process of giving legislative expression to these compromises, general principles of justice for treating like situations in like ways may be discerned, so that the legislative process bears a resemblance to the process by which the common law was built up. The line of progress, however, is from the particular to the general, from the view that such-and-such an arrangement, having proved appropriate to the catering industry may be applied in a modified form to the grocery trade, not, that is to say, from the general to the particular, *e.g.*, from the view that property should be public to the view that I.C.I. should be nationalised.

The idea that the State exists to reconcile established interests is a doctrine of the manner in which State power should be exercised rather than specifically a view of the limitations which should be imposed upon it. Closely associated with it, however, is the notion that these reconciliations should wherever possible be brought about without the intervention of the State, and the view that, within certain limits, society contains within itself the means and impulse of its own reformation. This is a somewhat subtly conceived idea, frequently distorted by want of definition into a truncated version of the Liberal conception of the automatic harmonising interests.

The difference between these ideas must be clearly established: the Liberal idea may be defined as the view that if all legal obstacles which can possibly be removed are removed, and individuals are left free to compete with each other, the greatest good of the community will result. The Conservative Party, on the other hand, regards with much more caution attempts to remove legal and customary restraints on individual initiative, holding that these restraints may supply the cement which is needed to protect society against the perpetual threat of dissolution. It is willing to remove these restraints only when a number of conditions is fulfilled, a proviso which is commonly expressed in everyday political language in some such phrase as "when the ground is prepared." The preparation of the ground is conceived as being the appearance of a situation in which the institution which it is proposed to reform has already begun to wither away, and in which the spontaneous forces of society are already clearly pointing to the kind of arrangement which will enable the life of society to continue without it. This is what Mr. Oakeshott means by the word "intimations."

A number of practical illustrations of this kind of situation occur to the mind: there is the classic example of the enfranchisement of women. Within the limits of the legal restraints imposed on women in the last century, they have proved capable of entering a wide variety of professions and of achieving a degree of personal independence within the home which custom had formerly banned. Their continued exclusion from representation in Parliament was in these circumstances an anomaly which had to be rectified. If the view taken was that the liberation of women by the spontaneous action of society was an unmitigated evil, it nevertheless remained true that the exclusion from the parliamentary franchise of a powerful section of the community enjoying otherwise a status of social equality was an absurdity and a source of discontent which could serve no useful purpose. Those who, like the majority of Conservatives, were disinclined to favour the equality of women, regarding it as contrary to the constitution of the universe, were, by the very nature of this argument, committed to the belief, that it could not permanently establish itself, and that their political enfranchisement would either be shortlived or prove, as it has done, to have no material effect for good or ill on the course of politics. Conservatives must not oppose the mere registering by law of accomplished social facts. The argument of prescription correctly interpreted cannot be used in Conservative orthodoxy as an argument against political changes designed to restore the harmony between legal and social facts.

Another instance of how this principle works may be drawn from contemporary controversy. It is the case of the House of Lords. Conservatives have a disposition, both rational and sentimental, to favour the hereditary principle; the hereditary principle, however, has lost much, though not all, of its prestige. A situation has also arisen in which the important legislative functions of the House of Lords cannot as a matter of fact be efficiently discharged by an almost wholly hereditary Chamber, and in which the search among the members of that Chamber for junior ministers who are qualified by temperament and training for sedentary and articulate occupations has become increasingly hard. Accordingly, the Conservative Party will recommend the reform of the House of Lords. The spirit, however, in which this will be done was once penetratingly indicated by the private remark of a second Viscount: "it would be nice to belong to a hereditary line of Lords Chancellor all chosen on grounds of merit." The faith that traditional institutions may sometimes be vindicated by removing from them the protective barrier of law and allowing them to display their strength in the open market is deeply rooted. Conservatives, in the true tradition, are not disposed for example to surround the public schools with any protective shield; they may hold that parents paying for their children's education should in equity be relieved of part of the financial burden of supporting the State system, but they will base their support for the public schools fundamentally on the view that they can justify themselves by achievement in open competition under the discipline of the public examinations system.

This view that legislation must register social developments rather than initiate them, and must set the conditions in which society can follow its own internal impulse towards progress is the essence of Conservative reform. It explains the fact that English Conservatives are both reluctant to accept change and unwilling to regard any institution as sacrosanct.

These ideas of the process of reform are closely associated with the assumption of a rough equilibrium of power between the social classes. This notion of the intrinsic virtue of balance and of the importance of using political power to secure it will be found to be of considerable importance in determining the Conservative attitude to all practical questions. It may rank as another important characteristic of Conservative thought.

It remains to analyse the effect of these historic attitudes on the part of the Conservative Party in contemporary controversy.

Economic Organisation

The Conservative approach to the problem of limiting public power in relation to economic organisation may best be illustrated by contrasting its broad theory with the two opposing theories of classical liberalism and socialism. The classical liberal theory starts with the assumption that the regulative functions of the State in relation to economics may be confined to the maintenance of certain general conditions within which economic forces can be left to adjust themselves to each other automatically. Law and order, the enforcement of contracts and the maintenance of the currency are the chief of these conditions; if they are satisfied it is assumed that demand will evoke supply and the whole system will become self-adjusting. On this view, it is improper for the State to attempt to deflect economic forces to the service of specific social ends. The ends to which production should be directed will be settled by the nature and extent of public demand and this demand will itself set in motion the productive processes needed to satisfy it. To use the power of the State to promote any system of economic priorities is, on this theory, a breach of the principle of equality before the law.

The extreme opposite of these principles is represented by socialist orthodoxy. This orthodoxy may fairly be summed up as the view that all the productive and distributive processes in society ought to be directed towards the realisation of good social objectives, social objectives, that is to say, which are willed by the people. Private property and unregulated economic competition may be accepted in certain spheres because they are held to be consistent with these objectives and even to assist their realisation, but unless this can be established as the case, the control of production and distribution should be vested in authorities responsible to the public and capable by means of centralised direction of securing the execution of a rational and just plan of distribution. This extension of the authority of the State is held to be consistent with personal liberty and even necessary to it for two main reasons: it is alleged, in the first place, that capitalism either because of the insecurity which it creates or because of its tendency to monopoly is a source of tyranny over the private citizen; in the second place, it is argued that liberty should begin only when elementary justice is established and that when a rational and just system of distribution has been set up, the private citizen, free from the threat of unemployment and exploitation, will be able to devote himself to those pursuits in which freedom is a necessity.

Historically, Conservatism in Britain has rejected both these alternative theories: it has attacked the theories of classical liberalism on several grounds, notably on the ground that the general state of adjustment which unfettered competition is said to bring about is an illusion. It has maintained strongly that there are certain social objectives of a principally national defence which are not adequately assured by the free play of economic motives and which may necessitate, for example, the deliberate protection of certain industries, like agriculture, by the imposition of tariffs. It has extended these necessary social objectives to include the protection of labour against unduly hard conditions and, in our own day, the maintenance of full employment and of a system of social welfare. In all these respects Conservatism is still sharply distinguished from the classical liberal theory. Essentially, however, the distinction is between the individualism of the classical liberal theory, with its insistence on the maintenance of general laws within the limits of which all producers and consumers will be free and the conservative habit of accepting the legitimacy of organised interests inside the State and the duty of effecting compromises between their wishes.

The contrast between Conservatism and Socialism, however, is today much more strikingly apparent. Conservatives are sceptical of the idea of imposing a perfect system of priorities by centralised direction for several reasons: they believe that there is no efficient means of keeping such a concentration under genuinely public control since it cannot be effectively supervised by Parliament; they believe that there is no easily accessible and generally agreed standard of distributive justice in society, and that, within large limits, the functioning of the laws of supply and demand achieves a more realistic system of priorities than can be got by official direction, since it at least secures that the talents which the community needs shall be rewarded to an extent which will ensure that they are exercised. The Conservative conclusion may be best expressed thus: the creation of national wealth by private effort and its distribution according to the results of private competition should be assumed as the general rule; this arrangement, however, is far from infallible, and it is necessary for the State to intervene not only to maintain the conditions such as a stable currency which are necessary to the functioning of private competition but also to ensure that certain fundamental social objects are achieved. Furthermore, even the maintenance of the currency, which now involves the preservation of a correct relationship between the amount of money in circulation and the number of goods available for purchase is a matter which imposes the need for judgments of value. Whenever full employment and adequate standards of living can be assured by indirect fiscal action designed to stimulate or reduce economic activity, this should be done, but Conservatism does not exclude the judicious use of direct controls to achieve *ad hoc* purposes which are clearly essential but which would not be achieved by the normal operation of competition. National Health, defence, the preservation of rural amenities, the opening of new outlets for industrial development, all, for example, make the distribution of population a matter of public concern and are held to justify such expedients as the compulsory acquisition of land. The Conservative prejudice is not so much against the pursuit of concrete social purposes by political action (that is the liberal prejudice) as against the Socialist idea of a comprehensive social plan conceived and carried out by central government.

It should by now be clear that when Conservatives speak of the interaction of economic forces, their thinking is not confined to economic competition between individuals. They do not look with traditional liberal suspicion on the development of corporations within the State; they believe, indeed, that group loyalties are the necessary cement of public allegiance. They hold that a large part of politics will always consist in supervising and helping to contain and sometimes to settle the conflicts between these private interests. The chief of these conflicts today is, of course, between employers and organised labour. The type of State intervention in this sort of dispute is familiar: the first requisite is that both sides should be given a chance of agreeing; the second is that the Government should put at their disposal whatever resources of diplomacy it has, making available machinery for mediation or even arbitration when this is acceptable; the third is that when agreement fails to be achieved or is achieved only after considerable delay, the public should be correctly informed about the origins and responsibilities for the dispute so that a due measure of social pressure may be brought to bear on any party who is held to have offended. For this last purpose, the appointment of an industrial court of inquiry is now a characteristic expedient. All these manoeuvres now take place against the background of a general assumption that in the last resort it is the State's duty to maintain essential services, and that direct action to this end is always an ultimate expedient.

Another characteristic type of Conservative State intervention relates to the protection of the consumer against exploitation by those key industries which have become monopolistic or semi-monopolistic as far as the home market is concerned and which Labour would, for this reason, nationalise. The treatment of these specific industries should be distinguished from the general problem of suppressing monopolies and restrictive practices. A typical example of Conservative policy in relation to these key industries is the organisation, following its de-nationalisation, of the iron and steel industry. The assumption is that the State in these cases should take over precisely such powers as can be shown to be normally necessary to the consumer's protection, possibly keeping in reserve for exceptional occasions greater powers of regulation, such as are possessed by the Iron and Steel Board.

Here then is the broad picture: fundamentally, society depends for the satisfaction of its needs on the spontaneous activity of its members; distributive justice is not a thing to be defined in terms of general principles and then achieved by governmental decrees, but a thing to be approached by an infinite series of accommodations between private interests. As a result of these principles a number of distinct types of State intervention occur: State action, preferably fiscal in character, to ensure that economic freedom does not impede the realisation of social objectives like full employment and a minimum of welfare; *ad hoc* State action designed to affect the economic process at some particular point where it has manifestly failed to fulfil a pressing need (*e.g.*, town and country planning); regulative action designed to protect the consumer when it is clear that his interests would be injured if the State did not intervene;

mediating action designed to facilitate agreements between private interests such as employers and employed and deriving some force from the knowledge that it is being taken by the representatives of a sovereign authority with ultimate responsibility for maintaining the life of the community.

ADMINISTRATIVE LAW

It is a commonplace that such direct controls as are exercised by the State frequently involve the delegation of legislative power to Ministers of the Crown or subordinate public authorities and also the delegation of quasi-judicial authority to administrative tribunals. Conservatives start with the belief that this sort of State activity should be kept to the minimum, and this belief largely explains their hostility to Socialism. It is clear, however, that administrative decrees and quasi-judicial powers are essential to modern government. On administrative legislation all that need be said is that the Conservative mind is preoccupied with the need for maintaining proper Parliamentary supervision of the exercise of these powers. In a highly regulated economy, effective Parliamentary supervision has been shown to be virtually impossible and accordingly the safest solution of the problem is to avoid a high degree of regulation.

Quasi-judicial powers present more serious difficulties which are not normally well understood by the public. Many administrative tribunals wielding such powers are not occupied in the administration of a certain and precise law; their *raison d'être* is the need for wide discretionary powers in deciding how the objects for statute should be pursued in particular cases. Nevertheless, if it is not to be entirely arbitrary, such a tribunal must develop a case law treating similar cases in similar ways. Resistance to the decisions of such tribunals often constitutes a criminal offence punishable in the courts, and this makes their proper conduct essential to the defence of liberty. There is, of course, nothing new about the dilemma of judge-made law; the common law was built up in precisely this way, but the breadth of discretion enjoyed by an administrative tribunal may *a fortiori* be greater than that belonging to a court, and an administrative tribunal may not consist exclusively of persons trained in the impartial administration of justice.

Apart from the general view that administrative tribunals should be created only when they are strictly necessary, Conservatives insist that their decisions should always be open to appeal in the courts. This does not mean that the actual substance of the decision should be the subject of an appeal (manifestly this would involve both an unreasonable duplication and the use of the judicial process for purposes for which it is not suited); but it does mean that administrative tribunals should be liable to be called upon to prove that they have acted within the limits of the powers entrusted to them and that they have impartially and thoroughly considered all the evidence relating to the decision they have taken.

Many Conservatives, in their consideration of this question, have been torn between a desire to ensure judicial impartiality in the operation of these tribunals and a desire to prevent the corruption of justice which would arise from the application of judicial methods to matters for which they are not suited. Much Conservative opinion, for example, has been troubled by recent legislation on monopolies which, it is felt, in its pursuit of impartiality has tended to treat economic decisions as though they were judicial decisions and to involve bearers of a judicial office in controversial administrative actions. Where it is necessary for Government departments or administrative tribunals to act on hunches, as is often the case, it is not right that their actions should be invested with the gravity of justice; this has been conspicuously illustrated in the deliberate preference of British Governments for purely administrative methods in dealing with the problem of political loyalty in the Civil Service.

Nevertheless, the growth of subordinate legislative authorities and semi-judicial administrative bodies has another side to it. The Conservative Party in the inter-war period was itself responsible for the creation of a large number of independent Boards, such as Marketing Boards, to carry out the provisions of legislation. The feeling is that where direct control is necessary it may often be most efficiently carried out by persons with specialised knowledge of a kind not available in the Civil Service and by persons free from any taint of political motive. This is to some extent offset by the feeling that bodies of this kind may develop into privileged corporations with the sanction of public power behind them but in no sense effectively answerable to the people's representatives. This dilemma appears today in the problem of administering the nationalised industries, and Conservatives are much concerned to find methods by which the Boards controlling these industries can combine a proper degree of immunity from petty interventions with a proper degree of answerability to Parliament.

WELFARE

The basis of the welfare services of this country is the principle of compulsory insurance. This is a principle which presents obvious problems to the liberal mind: it involves the assumption by the State of the right to compel its subjects to manage their affairs so prudently as to ensure that they are provided for in times of old age and adversity. This practice is normally justified on either or both of two grounds: it is alleged that it would be actuarially impossible to provide adequate insurance schemes at economic prices for the majority who need them unless the minority were obliged to contribute; it is also urged that those who through improvidence become a burden to the community are in fact infringing the freedom of the provident upon whom the duty of supporting them devolves. The Conservative Party has never resisted either of these arguments. It cannot without departing from its doctrines assert that compulsory insurance is in principle wrong; in practice, it welcomes the device as providing a source of support for the social services other than direct taxation and as a means of bringing home vividly to the citizen the cost of maintaining these services.

All this is qualified, however, by the Conservative belief that it is the business of every citizen to provide the necessities of life for himself and that there is no intrinsic virtue in a system which puts upon the State the duty of providing those necessaries. The Conservative mind has never been profoundly impressed by the Beveridge formulas about the basic minimum being a thing to be enjoyed as a right by every citizen. It tends to regard the basic minimum rather as a thing to be supplied by the State when the individual is incapable of supplying it himself. Conservatives are also sceptical of the proposition that the provision of the basic minimum is a first charge on the community's resources; they are inclined to argue that the first need is to ensure that the resources are themselves created and that this necessitates a degree of economic inequality designed to supply an incentive to production. Finally, Conservatives find no objection in principle to the imposition of a means test when the State is called upon to assist the individual out of the resources of taxation or when the funds of a public insurance scheme are adequate only to the provision of assistance in cases where it is needed.

It is probably true to say that other things being equal Conservatives would at present favour a drastic revision of the Welfare State in the direction of making some of its free services contingent upon the proof of need. It is, however, not only electioneering tactics which prevent the party from making this suggestion: to take an example from current discussion, it is plainly necessary to revise the basis of old age pensions; it would be perfectly logical to take the view that the most the State can do in this respect with any degree of efficiency is to maintain an insurance scheme designed to provide generous assistance to all who at the age of sixty-five can be shown to be unable to look after themselves. This proposal, however, is open to a practical objection: if generous old age pensions were immediately available to the impecunious old, much of the motive for private saving would be removed. An alternative method would be to provide an extremely low old age pension for those who could prove destitution, thereby preserving the incentive to private saving but maintaining a floor of security in the system. This method, however, would certainly be open to serious political misrepresentation.

Accordingly, in the matter of social security, the Conservative Party has a divided mind: it dislikes compulsory schemes in themselves and it believes that the individual ought never to be given the impression that it is not his business to look after himself and his family by his own efforts. On the other hand, it believes that nobody ought to be allowed to fall below a certain level. It does not disapprove of a means test in principle but it does recognise that its application in certain cases may be inhumane. Conservative thought is still struggling with the problems inherent in this set of principles. If a firm doctrinal difference is sought between its attitude and that of the Labour Party, it may perhaps be thus defined: Labour believes or gives the impression of believing that the provision of the necessities of life by means of collective arrangements in which the individual is compelled to participate and which will benefit him automatically, is in itself a thing to be desired; Conservatives believe that every man is ultimately responsible for the care of himself and his family, that this duty ought not lightly to be delegated, but that collective arrangements should be made to ensure that a basic minimum is secured to all including those who through deficiencies of ability or will have failed to provide for themselves.

FREE ASSOCIATION

The right of free association is normally included in definitions of elementary human rights. English Conservatism certainly favours it as it fits in with a general bias against centralised administration. The right of association, however, presents acute difficulties which are best exemplified in the case of the trade unions.

The principle that men should be free to combine in withholding their labour has been taken to remarkable lengths: it has been pressed in particular to the point of including the right to withhold labour unless the employer consents to withhold employment from anyone who does not belong to a specific trade union. Is this an encroachment on personal liberty—the liberty of those who do not want to join unions—or would it be an encroachment on personal liberty for the State to prohibit the unions from insisting on this condition when negotiating with employers? There is no satisfactory intellectual principle for determining with absolute certainty in all circumstances where one man's freedom ends and another's begins. When in the last century the Conservative Party encouraged the growth of trade unions it did so on no abstract principle of liberty but on the ground that they represented an under-represented interest within the community and were a necessary device for protecting the welfare of the worker. Today, Conservative opinion is inclined to the view that trade unions represent an over-represented interest and that forms of union discipline appropriate to former times have become forms of gross exploitation. At the same time, Conservatives accept the unions as an established interest and the whole of the present Government's domestic policy is based on an attempt to curb inflation with the co-operation of this interest. Its long-term object is to establish the fact that trade unions are privileged corporations and to encourage them to accept the responsibilities which that position implies.

LOCAL GOVERNMENT

Conservatism is favourably disposed towards local government. Fear of the concentration of power and belief in the importance of variety are the main ingredients in this disposition. It is a commonplace of all political parties that there are some matters of such general social importance to be settled on such general principles that they are appropriate to central government, and other matters where special local interests are concerned or where experiment is desirable which are appropriate to local government. Conservatism offers no infallible test of which subjects come into which category; the most that can be said is that its bias is towards devolution.

FOREIGN AFFAIRS

The State is limited in respect of other States as well as in respect of its own subjects. Conservatism has always opposed the view that foreign affairs can be discussed on the assumption that a fully developed community of nations with an authoritative legal system is already in existence. Its conception of international relations is perhaps best expressed by saying that it holds them to be in what Locke meant by "a state of nature," a state in which moral obligation can be assumed but in which no impartial machinery exists to secure its performance. Foreign policy should, on this view, be directed towards preserving as much stability as possible in international relations and should not gratuitously offend against those conventions which are described, often by a somewhat misleading analogy, as "international law." It should not be based on the assumption that disputes between nations can be referred to an authoritative and commonly accepted code of justice. Peace must be sought through the reconciliation of national interests but nations must retain the right to defend themselves and to interpret for themselves the way in which their power can be most humanely exerted.

CONCLUSION

A chiefly empirical political philosophy cannot easily be reduced to abstract expression. In its approach to the limitation of the authority of the State, Conservatism makes use of the following broad ideas: politics and society are to be conceived of less as a matter of drawing boundaries between the legitimate spheres of individuals than as a matter of reconciling interests; interests should be allowed as far as possible to adjust themselves to each other, the State intervening only when such adjustment fails to take place; the State is dependent upon society in the sense that its main function is to register and consolidate the changes in habit which take place in society; policy is to be formed by looking at the forces at work in the community and trying to see how best they can be harmonised in a way consistent with the safety and happiness of the community as a whole conceived as a continuing thing; balance and devolution are more consistent with freedom than the concentration of power. These general principles clearly leave much scope for individual interpretation; contemporary Conservatism is biased towards an interpretation favourable to the limitation rather than the extension of public authority.

THE PRINCIPLES OF STATE INTERVENTION

A SOCIALIST VIEW

PETER SHORE

INTRODUCTION

OVER a century ago, in his *Principles of Political Economy,* John Stuart Mill addressed himself to the subject of these articles. There were occasions, he acknowledged, when the State was bound to intervene in the economy either to protect those who could not protect themselves or to prevent abuses of private power. But these occasions, though fairly numerous, were exceptions. "*Laisser-faire,*" he wrote, "should be the general practice; every departure from it, unless required by some great good, is a certain evil."

This passage reflects Mill's belief—a belief shared by most of his contemporaries—that the *laisser-faire* system not only worked but worked better than any system of State regulation could be expected to do. In addition, to State activity generally, Mill advanced three main objections: that the employee of the State is unlikely to do things as well as the private citizen; that the more the citizen does for himself, through his own exertions or through voluntary agencies, the greater his self-development will be; that the larger the role of the State becomes, the greater is the threat to the liberties of the subject.

Here then are major criticisms—practical, moral and political—of the positive State.

MILL'S CRITICISM OF THE POSITIVE STATE

The *Principles of Political Economy* first appeared in the heyday of *laisser-faire*—shortly after the repeal of the Corn Laws, shortly before the Free Trade Treaty with France. As might be expected, much of the orthodoxy of the then dominant school of political economists is reflected in its pages. Yet, today, in spite of a century of increasing collectivism, one cannot fail to be struck by the familiar, curiously contemporary, flavour of its thought. It is as though Mill had erected a framework within which the long debate between the advocates and critics of State initiative had ever since been confined. For not only does his general presumption for *laisser-faire* persist, but so too do his particular objections to State action, summarised above.

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That this should be so may be interpreted as a tribute to Mill's far-sightedness and clarity of mind. But it may also be viewed as an example of the unreality and backwardness of contemporary political discussion. Before discussing then the case for State intervention, it is worth looking more closely at the validity of these criticisms.

Private versus State Enterprise

What are the grounds for the widespread belief that private enterprise is more efficient than public enterprise? In Mill's day, the answer was clear enough: first, that men who are their own masters, or who aspire to be so, can be expected to work harder and more efficiently than the employees of the State—simply because the former are working for themselves; secondly, the servants of the State were almost certain to be inefficient since so many of them owed their places to patronage, nepotism and corruption.

But both these conditions have long since passed. The individual entrepreneur has been replaced first by the joint-stock company, then by the large managerial corporation, while the State service has been radically reformed and its industrial functions largely hived-off into a new organisation—the public corporation.

As these have developed in the past decade, one is struck not by the differences between private and public enterprise but by their growing similarities. Certainly, they cannot be distinguished by their organisational structures for these are determined not by the nature of their ownership but by administrative problems which—allowing for special historical and industrial influences—are common to both. Nor can they be properly distinguished by size. In Britain several private firms are larger than such public corporations as the nationalised air-lines, the area Gas and Electricity Boards, and the Atomic Energy Corporation. Still less can they be distinguished by the incentives, attitudes or experience of those who control them. For both public and private enterprise are managed by the same breed of men—the salaried executives with little or no stake in ownership—who can be, and indeed are, easily interchanged.

It may be doubted even whether their forms of accountability, radically different as they appear to be—private corporations to their shareholders, public corporations to Ministers and Parliament—reflect real differences; for in most matters they are both virtually autonomous.

A number of conclusions might be drawn from these comparisons. But here it is only necessary to underline the point that over a wide range of their activities and certainly over their day-to-day activities, the differences between public and large-scale private enterprise have virtually disappeared. Consequently, the familiar objections to State intervention in industry, based upon the supposed differences and superiority of private enterprise, can be largely discounted.

Self-Help or State Help

The fear that the State may be doing too much for the citizen has been often expressed—and not always by thinkers as disinterested as Mill. Nevertheless, there appears to be a genuine anxiety that the citizen be relieved by the State of so many responsibilities for his own and his family's welfare that he might fail to develop, as he otherwise would, qualities of self-reliance and independence.

The connection between the extension of State services and the arresting of personal development has never, to my knowledge, been properly explored or demonstrated. It is therefore a subject on which one can only speculate. But whatever problems the future may bring, there can be, in contemporary Britain, few grounds for such anxieties. For, in spite of the grandiose objectives proclaimed in the Beveridge Report—that the State should provide security against the various contingencies of modern life, " from the cradle to the grave "—the actual achievement has fallen very far short of the aim. Indeed, but for conditions of full employment that permit many pensioners, widows and partially disabled persons to supplement their pensions with part-time earnings, widespread poverty would almost certainly re-emerge. For the basic National Insurance pension—paid in retirement, unemployment and sickness—is today below, and has been except for short intervals since the inception of the scheme, the subsistence level, as that level was calculated in 1938. Those unfortunate enough to have no other income than that provided by National Insurance can, it is true, draw a supplementary pension, if they apply for it, from the National Assistance Board. Together, the two pensions should provide an income somewhat above the 1938 subsistence level.

But this is no feather-bed: and the prospect which faces the average industrial worker of a cut in his income on retirement, prolonged illness or unemployment to a quarter of his weekly earnings is clearly alarming. It would be quite unreasonable to assume therefore that anticipations of State benefits exert a negative influence on the desire to make such private provisions for emergencies as are possible to wage earners.

On the other hand it would be absurd to expect such efforts to make more than a marginal contribution to personal or family security. The correlation between size of income and private savings is sufficiently well established to make clear that the provision of security through personal savings is possible only to a small and well-paid minority of the working population.

But the objection to adequate State provision for security is based, one suspects, not on a rational assessment of the possible in the sphere of personal savings but on an irrational devotion to the old ideal of thrift. To the moralist, the actual achievements of thrift—personal security, financial independence—have always been secondary to the struggles involved, to abstinence and self-denial. In Mill's day it was necessary to make a virtue out of necessity, for there was no other way of winning personal security. Today, however, personal thrift has been largely replaced by different kinds of collective thrift. In these circumstances, to advocate a return to personal thrift because of its supposed moral value, is to reverse the natural order of things—to make, in fact, a virtue a necessity.

The only practical alternative to State schemes are company schemes—occupational pensions, sickness benefits and other welfare provisions that industry is increasingly providing. These, however, whatever their other virtues and defects may be, certainly do not promote self-reliance and independence. For they are compulsory, subsidised by both the company and the State and, being non-transferable, inevitably increase the dependence of the employee on the employer.

The Threat to Liberty

The last of Mill's objections to the active State—the fear that it would impinge upon individual freedoms—is certainly the most difficult to prove or disprove. All laws and all controls must, by definition, curtail someone's freedom, but they often have the effect of enlarging someone else's freedom at the same time. To attempt to measure freedom by the volume of legislation is not therefore a profitable exercise.

But although the extension of State activity in the economy has provoked in Britain strong opposition and sharp cries of protest, there is little in our recent experience that points to a major or permanent clash between the planning State and the traditional liberties of the subject; and there is still less to indicate that, when conflicts do arise, they cannot be settled according to constitutional precedents.

There are several reasons for this. One is the safety valve that political democracy provides against anger. All Governments are interested in their own survival and no Government is likely to press an unpopular policy too far unless it is strongly convinced of its overriding importance. (If it is really essential, even an unpopular policy has a good chance of winning eventual acceptance.) At the same time, those who are deeply affected by an act of State policy can at least comfort themselves with the hope that the next election will bring relief. Mill, like Marx, it is worth recalling had no experience of modern democracy or of a modern civil service.

Another reason is the considerable degree of popular acceptance that has accompanied the enlarged activities of the State. Certainly there have been criticisms but much of it—for example, the sporadic outbursts against compulsory purchase orders—has been directed against the administration of policy rather than against the policy itself.

A third reason which is likely to operate more powerfully in the future than it has in the past is the steady accumulation by State agencies of economic information and, with it, the development of control techniques that may be less cumbersome, less direct and more selective than those used hitherto.

For these and other reasons, there appears to be little justification for alarmist or pessimistic views about the consequences for personal freedom of economic regulation by the State. The dangers, such as they are, come far more strongly from political intolerance, from fear, from war and preparations for war. In Britain today, we enforce the licensing of dollar imports and the control of capital issues. It would be far-fetched to see in these controls a threat to personal freedom. But it would be quite unbalanced to view them as in any way comparable to such State activities as wire-tapping, the positive vetting of opinions and associations for security reasons and two-year conscription.

Conclusions

What conclusions are we entitled to draw? Simply that the criticisms of the positive State voiced by Mill and echoed with increasing unreality down the years have lost a great deal of their force. For they depend, in the last analysis, on a sharp contrast between individual initiative and the bureaucratic State which may well have been justified a century ago but which cannot today be legitimately made.

On the one hand, the economy is no longer exemplified by small-scale enterprise but by the large, managerial corporations; while on the other hand, the reorganisation of the State has purged it of corruption and turned it into a responsive and effective agent of political democracy.

It does not seem rash to assert, therefore, that if there are good reasons for State initiative in the economic and social field the State is not debarred, by inherent defects, from undertaking them.

ECONOMIC CONTROL

The interventions of the State in the economy are now so numerous and the events that prompted them so diverse, that any attempt to reduce them to neat categories is certain to fail. Nevertheless, a line of development can be traced from early interventions designed to deal with such socio-economic problems as hours of work, safety provisions and industrial health, through *ad hoc* measures—loans, tariffs, subsidies—to rescue afflicted industries, to the recent assumption by the State of broad responsibilities for the level of employment in particular and the health of the economy in general.

While some at least of these extended functions are now generally accepted there remains a fundamental difference of view between those who still believe and those who do not, that *laisser-faire* should be the rule and State interventions the exception. But can the role of the State be confined to the taking of corrective measures? Can it leave industry to take the initiative in economic development? Or must it, on the contrary, exercise continuing guidance over the whole range of economic affairs? For the latter view there appear to me to be a number of cogent arguments.

First, the nation has objectives in the economic field which are wider than, different from and sometimes opposed to those of industry. This is not to say that industry's objectives and those of the State do not frequently coincide. But it does mean that there are a great many situations in which they do not. Thus from the national point of view, the building up of the export trade to establish a balance and, better still, a surplus in our overseas payments is of crucial importance. But for individual industries and firms this aim has a much lower priority. If, for example, the motor-car manufacturers find that they can sell cars in the home market more easily and with higher profits than they could in export markets, the temptation to sell at home is well nigh irresistible. Such sales may be good for business but clearly they are not so good for the community.

There is, of course, nothing new in the fact that the purposes of industry and society frequently diverge. But once the State is charged with the responsibility for the overall well-being of the economy, it must, if it is to do its duty, bring the purposes of industry into line with those of the community. Thus, on this score alone, planning and controls of various kinds become inevitable.

The second reason for State control is that the private sector is rapidly losing what ability it had to achieve of its own accord the best distribution of resources as between different industrial projects.

The crux of the matter is the ability of the large firms to fix—within limits—their own prices and to accumulate, consequently, in their own reserves the greater part of the nation's savings. This is a development of great significance. For the free movement of capital on the one hand and competition in the capital market for new financial resources on the other are, in fact, two of the most vital built-in " automatic " controls of the free enterprise system. Once they are impaired, once the use of resources is governed by factors other than the comparative return on freely-circulating capital the rationale of the *laisser-faire* system is undermined.

In Britain today the major decisions about investment are no longer made by the impersonal forces of the market—nor by the planners—but by the board rooms of large companies. Something like 75 per cent. of all industrial investment is now financed from company savings, and as much as half from the savings of a few hundred large firms. As A. A. Berle put it in his *Twentieth Century Capitalist Revolution*:

" Not the public opinion of the market place with all the economic world from which to choose, but the directoral opinion of corporate managers as to the line of greatest opportunity within their own concern, now chiefly determines the application of risk capital. . . . Power assumed to be brought under review of bank and investment opinion a generation ago is now reviewed and checked chiefly by the conscience of directors and managers."

At first sight, when one considers the apparent efficiency and rapid growth of the leading managerial companies—*e.g.*, Shell, B.P., I.C.I., Courtaulds, anxieties are easily lulled. Surely, it can be said, Board Room experts are better qualified to judge the best use of resources than a miscellany of investment trusts, insurance companies and pension funds? Surely, too, the Board Room would be less conservative and more willing to take legitimate investment risks? Surely, too, the Board Room has better instruments for economic forecasting and assessment and can cost and budget its projects far more accurately than anyone else?

These points may be admitted—as far as they go. But against them must be set other and less favourable considerations. The fact that a company is able to accumulate capital is no proof that it knows best how to spend it. Thus, although the Board Room may apply the most rigorous tests in selecting from the rival investment projects which come before it, the field of choice itself is bound to be limited. There is therefore a clear danger that resources accumulated and spent by some companies could be better employed in different sectors of the economy, quite outside their Board Room's purview.

At the same time, the location of so large a part of new investment funds in the reserves of large firms makes it extremely difficult for small and medium firms to acquire new capital for their own growth and for the development of industries which the large firms have ignored.

To prevent lopsided economic development—the overdevelopment of some industries and the underdevelopment of others, some planning of investment has now become essential. Board Rooms can normally be relied on to assess the prospects of their own companies, but they are in no position to judge the wider national interest—*i.e.*, what is desirable in the field of economic development after objective survey of the whole range of economic choice. To assess this national interest is indeed one of the main functions and justifications of central planning.

A third major reason for State intervention is the decline, regulation and, in some instances, outright suppression of competition in the private sector. This again is a development closely linked to the concentration of production in a relatively small number of large firms. There are, of course, a great variety of non-competitive situations. Sometimes a firm has such a technical lead and established market position in an industry that, notwithstanding the formal existence of rivals, its position is in fact unchallenged. In other instances a number of large firms reach a broadly similar stage of development in their products and processes and, concluding that there is nothing to be gained from further competition, tacitly accept the *status quo*. Again some firms may abandon price competition but continue to compete in service, terms and style, etc. Others again have formal and binding agreements not to compete with each other or to limit their competition to specific products and specific areas. Still more have informal agreements to the same ends. Finally, there are a number of firms which have, through growth, amalgamation, or purchase of rivals achieved a complete or near monopoly in particular fields.

The decline of competition that accompanies these developments is not always associated with a corresponding decline in initiative and effort in the industries concerned. But clearly, where a monopoly is entrenched or competition tightly controlled external pressures for charge and innovation are seriously weakened. To some extent the old dynamic of competition can be replaced by internally generated incentives. But obviously, nothing like the same faith can be placed in the latter as in the former. On the effects of monopoly on large firm initiative, some of the Monopolies Commission Reports are highly relevant. The recent Report of the British Oxygen Company which completely dominates the sale of oxygen in the United Kingdom has this to say about B.O.C.'s research activities:

> " It was only immediately after the war that a special research department was set up and it will be seen that in its long history

> B.O.C. has not been responsible for the discovery of any of the successive important new processes for the production or distribution of oxygen."

A few years earlier, commenting on the wide range of costs incurred by the different subsidiaries of the monopoly British Match Corporation, the Monopolies Commission found:

> " No evidence of any consistent policy of concentrating production in the lower cost factories. . . . B.M.C. has indeed only recently installed a costing system which enables it to measure and compare the cost of making various types of matches in its different plants."

Lack of competition can also often lead to a more direct waste of resources. There are the almost universal signs of business extravagance—the imposing H.Q. buildings, prestige advertising, the dignified journals, etc. Given high taxation and great retained resources, there is not only ample opportunity for the expression of Board Room whims, but to some extent an incentive to indulge them. Furthermore, there is no compelling need to deal with uneconomic subsidiaries as long as their losses can be covered, often many times over, by the combined profits of a group.

These, then are some of the dangers to which large firms are prone. It is true, of course, that similar problems will arise in any large undertaking—including the nationalised industries. But in private corporations given the absence of competition, absentee ownership and Board Room control, there is no developed machinery of accountability which can be expected to operate. In such conditions, the wonder is, not that there are examples of inefficiency and waste, but that there are not far more.

For the reasons given it should be clear that the case for State planning embraces not only the now widely accepted purposes of balancing the economy, maintaining full employment, correcting booms and slumps and reviving derelict private industries but in fact goes considerably wider. The case for *laisser-faire* has always rested on the two assumptions that, in the private enterprise system, there existed (i) the disciplines of price competition to penalise failure and reward success, and (ii) a yardstick—return on capital—that would guide freely circulating capital resources to the places in industry where they could be most effectively used. It is only when these conditions are fulfilled that private enterprise can be expected to serve, within its own limitations, the public good.

Given the existing structure of industry neither of these conditions can be—at best—more than partially realised. In place of competition we now have amalgamations, joint enterprise, trade associations and a hundred and one restrictive arrangements. In place of the invisible hand of competitive profit-seeking, we now have the visible hand of Board Room direction.

In our day then the economic case for planning and control seems unanswerable. There is no longer a choice as to whether the State should play an active role in the economy. The only questions worth debating are the purposes of its intervention and the methods to be employed.

SOCIAL POLICY

The intervention of the State cannot be confined to economic regulations; it must also be concerned with the allocation of the national income and wealth as between different persons and groups and different categories of expenditure.

First of all, economic activity gives rise to very unequal rewards and the incomes of a substantial section of wage earners, even when employed, fall below the level at which they can be expected to make adequate provision for themselves and their families. " Adequate provision " is an imprecise term but it will suffice to define it as that standard of living which, at different times, effective opinion considers to be the tolerable minimum. Wage negotiations even in conditions of full employment are unlikely to secure for all workers the required minimum standard. They are unlikely to do so partly because some unions are weak—and not all industries are prosperous—but mainly because wage levels relate to work performed and not to the needs of individual workers. Needs, however, vary enormously: a worker with a large family clearly requires a weekly wage far in excess of a single man. The provision of a social wage, whether it takes the form of family allowances, subsidised housing, or preferential tax treatment is therefore imperative.

Secondly, although wages may be sufficiently high to meet the ordinary expenses of living they are seldom sufficient to enable the great bulk of wage earners to fend for themselves in the various contingencies of modern life—in old age, sickness and unemployment. Hence the need for the national provision of social security payments, with substantial assistance from public funds.

Finally, there are those services, notably education and health, which are generally considered to be so important to the life of the community that they have been developed over the years into free and universally available State services.

These services are financed partly by contributions and partly by taxation which under our progressive system of income tax and surtax falls with considerable severity on higher incomes. This has provoked much opposition and criticism in recent years. It is said, for example, that if taxation is pressed too far it will have an adverse effect on incentives. It is also said that by taxing the rich the State is absorbing in current expenditure a surplus which would otherwise have been available as savings for industrial investment.

These objections, though often repeated, are far from convincing. It is true, of course, that a worker on piece rates or overtime may hesitate to take on extra work if a large part of his extra earnings will be absorbed in taxation. But although much has been heard of high earnings, the worker paying surtax has yet to be discovered: and, until the surtax line is crossed, the worst that can befall him is a loss of approximately seven shillings in every pound of extra earnings. This is considerable but not penal. In a survey carried out for the Royal Commission on Taxation, no evidence was found of the alleged disincentive effects of high taxation on the industrial worker.

But what about the higher income earners—the managers, executives and directors? Certainly the weight of taxation on these groups is heavy. Nevertheless, it is doubtful whether their incentives have been impaired. Those who have worked in organisations would not, I think, disagree that after certain salary levels have been attained, financial incentives become clearly subsidiary to the drives of power, status and prestige. In our society, the representative figure is not " Economic Man " but " Organisation Man."

As for the impact of taxation on savings, there seems little cause for anxiety. In the past the savings of the rich were a vital source of industrial finance but today this is not so. The main source of industrial finance is now the retained profits of business and, in so far as external capital is required, by far the greater part is now provided, not by individual savings, but by the tax exempted collective savings of the insurance companies and pension-funds.

But if these objections to income redistribution can be dismissed, a further and more controversial point arises. Should the State consciously seek not merely to provide through social services a minimum standard for those who would otherwise be without, but attempt in general to regulate rewards according to some principles of social justice? This is a development which I believe to be both desirable and inevitable. With different organised groups—not only industrial workers but doctors and even company directors—pressing their claims for ever larger incomes (claims which *in toto* persistently exceed available resources) the State is, in spite of all its protestations to the contrary, bound sooner or later to adjudicate between them. In doing so it will have to take account of the needs of different groups and the contributions which they make, and to relate its decisions increasingly to principles of social justice.

Such an intervention would probably, but not necessarily, lead to greater equality between the highest and lowest rewards in the community; but it would certainly involve major changes in the existing pattern of rewards. The reason for this is that the existing rewards of many income groups are based on historical considerations which have long ceased to be valid. This applies to many groups of professional workers as well as manual workers. But the most important change that is likely to come is a reduction in the income that flows to property owners—and particularly the owners of industrial shares.

In the past the incomes accruing to property owners, however large, could be justified either on the grounds that they provided—though privately owned—the bulk of the community's savings, or, in the case of the owner-entrepreneur, that they represented the rewards of successful enterprise.

Today, however, the great bulk of unearned income flows from share ownership in the large managerial companies. Here, with the separation of ownership from actual management virtually complete, with the decline of risk in industrial investment, and with new sources of finance now available, the private shareholder has not only ceased to be indispensable to the economic system, he has become virtually functionless.

Tax policy has already taken some account of these developments: unearned income is taxed more severely than earned income and a differential profits tax discourages dividend distribution. Moreover, successive Chancellors, with varying degrees of conviction, urge dividend restraint upon the board rooms. But it is difficult to believe that these measures will not be extended. For unearned income, by its very nature, is vulnerable to attack. It will require in the future strong, new evidence of its function and role if it is to be left unmolested, and it is not easy to see how this can be supplied.

WHAT GOVERNMENT SHOULD TAKE UPON ITSELF

In this article it has been possible to touch on only some of the main considerations that affect the role of the State. Nevertheless, if the argument is correct, the conclusion seems inescapable—that the responsibilities of Government and the activities of the State are bound to widen in the years ahead. The underlying causes are, as we have seen, the decline of the *laisser-faire* system and the rise of political democracy. The one points to the growing need for the State to replace the market as the regulator of economic activity; the other points to increasing political pressure to achieve an organisation of society that satisfies more fully the needs of its members. There are two great historical processes and, while both are well advanced, they are as yet far from exhausted.

To develop further these conclusions would lead from describing trends to formulating proposals. It is enough therefore to close with a few words from Mill which express the essential truth:

> " In the particular circumstances of a given age or nation there is scarcely anything really important to the general interest which it may not be desirable or even necessary that the Government should take upon itself."

CABINETS AND COUNCILS IN CANADA

J. R. Mallory *

In outward form the structure of Cabinet government in Canada has changed little for a century; and no significant changes in procedure or in the conventional way of doing business were introduced until the Second World War. Confederation in 1867 made few changes in a system of government already established in British North America, except to divide the Province of Canada again into its constituent parts under the names of Quebec and Ontario, and to create a federal system with new organs of central government.

Council and Cabinet

Cabinet government developed in the eighteen-forties within the framework of the Governor's Council, but it was achieved only after certain necessary administrative reforms had been made in the machinery of the executive. Lord Durham had found administrative chaos the principal obstacle to reform, and he urged the reorganisation of the executive into departments, each headed by a competent and responsible member of the executive who would be able to advise the Governor on policy to be adopted.[1] Although Durham's principal recommendation, the grant of responsible government in local matters, was rejected by the British Government, his successor Lord Sydenham was able to effect a thorough reorganisation of the executive. Before his untimely death in 1841 he had created the several departments of government each headed by an Executive Councillor who was also a member of the legislature. The Governor in Council thus became the policy-making organ of the government. Before the grant of responsible government the Governor was the effective head of the executive, presiding over his Council and using his patronage and his powers to ensure that his Ministers had a working majority in the legislature.

In practice it proved impossible for the Governor to be in effect his own Prime Minister. After the advent of Lord Grey to the Colonial Office in 1846 it was conceded that the Governor must

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[1] A thorough and detailed discussion of structure and organisation of the executive in the quarter-century before Confederation is contained in J. E. Hodgetts, *Pioneer Public Service: An Administrative History of the United Canadas 1841–1867* (Toronto, 1956). It throws much new light on the origins of cabinet government in Canada.

choose as his advisers those leaders who could command a majority in the legislature. This shift in the balance of power from the Governor to the political leaders of his administrative team was reflected in the conduct of business in the Council.

There were thus three distinct stages in the development of Cabinet government in Canada. Lord Sydenham's system of ministerial government, in which the Governor was still the effective leader of the administration, proved to be politically exasperating and ultimately unworkable, but it did lay the essential foundation for responsible government. For when responsible government came, Canadian politicians had had over six years of administrative experience, a functioning administrative body accustomed to ministerial direction, and a two-party system accustomed to the responsibility of power. The second stage, by 1848, was the grant of responsible government itself, which meant that the Governor should retain his advisers only so long as they, as a group, were able to maintain a majority in the lower house of the legislature. As long as they were in office the Governor must, except where imperial interests were at stake, adhere to their advice. There followed the third stage—the introduction of true Cabinet government—which required the withdrawal of the Governor from direct participation in the deliberations of his advisers. This did not come about until at least six years after the introduction of responsible government. The manner of its coming was, in reality if not in name, through the separation of the Cabinet from the Executive Council. What Anson called the deliberative and the executive functions were already quite clearly divided between two different bodies, the Committee of Council and the Governor in Council. "The Council," wrote Sir Edmund Head in 1857, ". . . discuss *in committee*, the Governor not being present, the various measures or questions with which they have to deal."[2] The Committee of Council was simply the Ministers meeting in the absence of the Governor. Their conclusions were given legal sanction by becoming formal actions of the Governor in Council. If the submissions were routine they were usually transmitted to the Governor for his signature at leisure in his office. But the Governor reserved the right to go into Council to discuss measures and to approve them in formal Council.

This third stage, in which the Governor did not usually participate in the discussion which led to decision-making, created a shift in the balance of power in the executive from the Governor to the political leaders of the Cabinet, and thus to the growth of the distinctive position of the First Minister. Although the Province of Canada had been united, the politics of its constituent parts, Upper and Lower Canada (now Ontario and Quebec), created a *de facto* federalism and made coalitions essential. A consequence of this was that there were always two premiers (or First Ministers, as they were called), one from each part of the Province. It was only when Confederation created a true federal system embracing New Brunswick and Nova Scotia as well as the two Canadas that a single Prime Minister emerged. But the emergence of the single Prime Minister further diminished the role of the Governor. As long as there were two First Ministers, the Governor retained a degree of initiative by being able to hold the balance between them, but after Confederation the single Prime Minister left the political executive in a dominant position and the Governor-General in the increasingly passive role of a constitutional head of State.

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[2] Quoted in D. G. G. Kerr, *Sir Edmund Head* (Toronto, 1954), pp. 174–176.

The division of the executive process into two distinct stages and bodies, the Governor in Council and the Committee of Council, persisted even after Confederation. For the formal Council remained as part of the process. After Confederation, however, the formal Council presided over by the Governor seems to have met chiefly for such formal functions as the swearing-in of Ministers. The transmission of Reports, Draft Minutes and Orders to the Governor-General for his approval, without the summons of a formal Council, became the normal and regular procedure. An examination of the Privy Council Minute Book and the Oath Book [3] make it clear that the Governor-General presided in Council for the following functions: the laying before Council of the Proclamation and Instructions after his Installation in office; the administration of oaths to Privy Councillors and Ministers; the administration of oaths of office to provincial chief justices and certain other officers; and, possibly, the formal approval of Orders or Minutes of Council. There is only one clear case after Confederation in which it is certain that the Governor-General met with his Council for the discussion of important business. Lord Dufferin, in a dispatch dated August 15, 1873, reports that he met with his Council to lay before them the terms on which he would accede to a prorogation of Parliament during the parliamentary crisis as being for life, while the tenure of provincial executive councillors v over the Pacific Railway scandal which led to the resignation of the Macdonald government in the following November.

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[3] The requirement that the Minute Book be kept was dropped from the revised instructions issued to the Marquis of Lorne in 1878, but the Minute Book was in fact kept until 1882. Whereas even today the " Report " of the Privy Council still states " Present; His Excellency the Governor-General " followed by a list of Privy Councillors described as present, this is but a form of words. Evidence that it was in fact a formal Council is provided by such phrases as " which oaths were administered by His Excellency," and " His Excellency then withdrew," which appear in the Minute Book. I am indebted to R. B. Bryce, Esq., Clerk of the Privy Council, for permission to examine the Minute Books and Oaths Books of the Privy Council.

The formal Privy Council seems to have become more rare in the eighteen-eighties. The last administration to be installed at a formal Privy Council was that of Sir John A. Macdonald in 1878. The last occasion upon which Ministers took the oath in Council was apparently on January 27, 1887, and the last occasion in which the Oath Book carries the attestation of the Clerk that the oath was administered before the Governor-General in Council (rather than the Governor-General) was on December 5, 1892. On that occasion the oaths were administered to the Chief Justice of Canada.

The structural distinction between the Governor in Council, as a legal abstraction meaning only that the Governor had subsequently approved the advice of his Council, and the Committee of Council, which is the legal guise assumed by the Cabinet when tendering formal advice, is common to both the federal executive and to the provinces. The existence of formal Councils presided over by the Lieutenant-Governor after Confederation is in most provinces uncertain. One thing only is clear, no record or recollection of such Councils exist in any province except Newfoundland in recent years.[4] There is some reason to believe that in some, if not all, provinces the Lieutenant-Governor customarily presided over his Council even for the transaction of business in the early formative years.[5]

The practical and latently republican atmosphere of North America has tended to wither the pomp and circumstance of ceremonial functions. The formal council may well have seemed not only a somewhat absurd and imitative rite to Canadian politicians, but one which unduly emphasised the role of the Governor in the Executive under the conditions of responsible government. The role of ceremonial in strengthening the " deferential " attitudes is well known to all readers of Bagehot. Canadian nationalism has caused most Canadian politicians to be suspicious of deference as a sign of undue subordination to the outward symbols of imperial control.

In practice the tenure of members of the Privy Council is regarded is treated as being during office only. Section 11 of the British North America Act provides for a Privy Council " to aid and advise in the Government of Canada " and that its members " shall be from Time to Time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General." In fact membership in the Privy Council has always been deemed to be for life, and no Privy Councillor has ever resigned or been removed from the Privy Council.[6]

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[4] Newfoundland, which entered the Union in 1949, still preserves the formal Council. There the Ministers meet for the discussion of business as the Committee of the Executive Council, but Minutes and Orders are signed by the Lieutenant-Governor at a Council summoned at Government House for the purpose.

[5] In Prince Edward Island the Lieutenant-Governor normally presided over meetings of the Executive Council. The practice of Ministers meeting as " the Committee of Council " in the absence of the Lieutenant-Governor began there in the 1870's, and the full Council, presided over by the Lieutenant-Governor, lapsed after 1887. See Frank MacKinnon, *The Government of Prince Edward Island* (Toronto, 1951), p. 183. A similar development took place in the same period in British Columbia and Manitoba.

The tenure of provincial executive councillors is otherwise. Section 63 of the British North America Act provides that " the Executive Councils of Ontario and Quebec shall be composed of such Persons as the Lieutenant-Governor from Time to Time thinks fit " and makes provision for the initial composition of those bodies.[7]

The difference in the customary tenure between the Privy Council and the provincial Executive Councils is explained by Alpheus Todd as one of convenience since a purely formal body for ceremonial purposes is unnecessary in colonial constitutions which " should be as simple and practical as possible." [8] With few exceptions summons to the Privy Council has been confined to Ministers. Occasionally, however, distinguished persons from other countries of the Commonwealth have been made Privy Councillors. Among these are numbered the Right Honourable W. M. Hughes of Australia, H.R.H. the Duke of Windsor, and Sir Winston Churchill. In addition, the Chief Justice of Canada is usually made a Privy Councillor, and a select few others (including Lord Alexander, a former Governor-General) have been named from time to time. In 1953 the then Leader of the Opposition, Mr. Drew, was made a Privy Councillor, though it is uncertain whether this may be regarded as a precedent.

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[6] When a member of the first Cabinet, Adams Archibald, was defeated in the general election of 1867 he submitted his resignation both as a Minister of the Crown and as a Privy Councillor. Macdonald replied " You will see by my former letter of acceptance of your resignation, that you are still a Privy Councillor. . . . The tenure of the office of Privy Councillor was discussed by myself with Lord Carnarvon and Lord Monk, and it was agreed that the tenure should be the same as that of a Privy Councillor in England—that is to say, that, while it is like other non-judicial offices, during pleasure, yet that in practice it is considered for life." Joseph Pope, *Memoirs of the Right Honourable Sir John Alexander Macdonald* (London, 1894), Vol. II, pp. 3–4.

[7] It was not necessary to provide for the Executive Councils of New Brunswick and Nova Scotia, since their constitutions were to continue as they had existed before Confederation. The provinces possess the power (under s. 92 (1)) to amend their own constitutions, and all provinces have modified by statute, from time to time, the constitution of their Executive Councils.

[8] " As a rule, all outgoing ministers should resign their seats in the executive council, or be formally removed from that body. Hitherto, it has not been deemed expedient to retain ex-cabinet ministers on the list of Colonial executive councils, merely as honorary members and in analogy to the imperial practice. An organisation resembling this imperial privy council, and liable to be convened on special occasions for ceremonial purposes, is not ordinarily required in colonial institutions, which, at the outset at least, should be as simple and practical as possible. But in the Dominion of Canada, the practice prevails that ' the Queen's privy council for Canada '—the members of which are appointed by the Governor-General, ' to aid and advise the government,' and are removed at his discretion—are nevertheless permitted to retain an honorary position in the council after their retirement from the cabinet. By command of the Queen, ' members of the privy council, not of the cabinet ' have a special precedence within the Dominion, and are permitted to be styled ' Honourable ' for life." Alpheus Todd, *Parliamentary Government in the British Colonies* (London, 1894), p. 54.

A peculiar and significant feature of Cabinet government in Canada, which arises from the physical identity of Cabinet and Council, is the wholesale use of Minutes and Orders in Council as the normal form of executive action. Another marked characteristic of Canadian Cabinets is the limited capacity of Ministers to act on their own authority rather than that of the Cabinet. Almost every ministerial act is covered by the authority of a Council minute or order.

This tendency has survived since before Confederation and two reasons for it may be suggested. The first is the marked sectional character of the country which makes it politically dangerous to give Ministers untrammelled authority over the policy of their departments. Each Minister tends to have a sort of veto of executive actions affecting the part of the country which he is known to " represent " in the Cabinet, and Ministers in the exercise of their powers thus prefer to have the authority of the Governor in Council for almost any power which they exercise. This tendency has been recognised and strengthened by the normal statutory requirement that the legislature normally confers delegated power on the Governor in Council rather than on an individual Minister. A second possible explanation is that in the early days of responsible government, it was valuable to have a formal record of advice tendered as evidence that the Governor was acting on advice and not on his own discretion as an imperial officer. Once the pattern was established, it evidently had considerable merits of convenience, both in the central and the provincial governments. For an Order in Council exercising power or a Minute of Council embodying " advice " on policy to be followed was a clear record of what had been decided. Thus the Canadian executive avoided the ambiguity inherent in British Cabinet Government from the time of George IV to the introduction of the Cabinet Secretariat, when uncertainty as to what in fact had been decided was often a source of difficulty.

FORMALISED CONVENTIONS

The British Cabinet system rests almost entirely on well-understood conventions which have no formal basis in constitutional law. An authority on the Canadian constitution has stressed the conventional basis of " responsible government ":

> " As (these conventions) were not part of the ' law of England,' it was considered inappropriate to specify them in the British North America Act of 1867. Even earlier, in 1839, Lord John Russell, then Secretary of State for the Colonies, had written to the governors: ' It is evidently impossible to reduce into the form of a positive enactment a constitutional principle of this nature.' This remains true today. Nowhere have the conventions of ministerial government been successfully and completely reduced to written or legal form." [9]

This is generally, though not wholly, true. The requirement that a Minister must have a seat in the legislature is not part of the law of the constitution in Canada or its provinces, as it is in Australia.[10] Nowhere is it enacted that a government which has lost the confidence of the legislature should resign. Nevertheless, some of the standard conventions have been written into the British North America Act, while others have achieved the quasi-written form of a formal Minute of Council. The more significant are the following:

1. *The duration and meeting of Parliaments.* The necessity of annual Parliaments is laid down in section 20 and the duration of Parliament is governed by section 50 of the British North America Act. This provision is further safeguarded by the British North America (No. 2) Act, 1949, which inserts a new section 91 (1). One of the effects of this section is to bar the Parliament of Canada from amending the constitution " as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House; provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House." These provisions in fact are a roundabout safeguard of responsible government, since, as Dicey pointed out, a ministry without a majority could not get supply and would therefore come ultimately in conflict with the law.[11]

2. *Constitutional basis of responsible government.* The preamble

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[9] H. McD. Clokie, *Canadian Government and Politics* (Toronto, 1950), pp. 46–47.

[10] The extreme case occurred in Prince Edward Island when a member of the cabinet of Prince Edward Island (the Attorney-General) held cabinet office for three and one-half years (1944–1947) without even attempting to seek a seat in the legislature. See Frank McKinnon, *The Government of Prince Edward Island* (Toronto, 1951), p. 173.

[11] A. V. Dicey, *The Law of the Constitution* (London, 1939, 9th ed.), pp. 446 *et seq.*

of the British North America Act recited that the provinces desired to be "federally united into One Dominion under the Crown . . . with a constitution similar in Principle to that of the United Kingdom." While the words of a preamble are not law, they constitute a declaration of intention, and there is no doubt that they were intended to apply to the principles of responsible government.[12] The constitution itself goes somewhat further. Section 13 enacts that "The Provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting by and with the Advice of the Queen's Privy Council for Canada." This, of course, does not ensure Ministerial responsibility to the legislature, but it has the effect of asserting collective ministerial responsibility for executive acts. There is little doubt that this was the intention. Sir Edmund Head, in a dispatch to the Secretary of State on March 4, 1858, pointed out the relevance of the identical phrasing in the Canada *Interpretation Act* (12 Vict. c. 10) to the operating principles of responsible government.[13] There can be little doubt that the clause in the earlier Canadian statute was deliberately inserted in the British North America Act to underline the principle of responsible government. Section 12 of the Act provides that the powers of the Governor-General shall be exercised "with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor-General individually, as the Case requires." Similarly, the Letters Patent constituting the office of Governor-General contain the same phraseology. Sections 65 and 66 of the British North America Act makes similar provision for the exercise of the powers of the Lieutenant-Governors of the newly created provinces of Ontario and Quebec. It should be noted that, for this reason, Ontario and Quebec are the only two provinces whose constitutions are contained in the British North America Act. The constitutions of the other provinces were either provided for by Imperial instruments before Confederation or, in the case of the provinces created out of the territories, by federal statute.

[12] It was intended that this provision should be in the body of the Act. Speaking in the Canadian Confederation Debates on February 6, 1865, Sir John A. Macdonald said "in framing the Constitution, its first sentence should declare that the Executive authority or government should be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British Constitution." Quoted in W. P. M. Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution* (London, 1929), p. 559. This declaration appeared in the Quebec and London resolutions, but it was disarticulated by the parliamentary draftsmen. S. 9 of the B.N.A. Act vests executive authority in the Queen, but the "well-understood principles of the British Constitution" were watered-down to the phrase quoted above and relegated to the preamble.

[13] *Public Archives of Canada. Secret and Confidential Despatches, Colonial Secretary, 1856–1866*, G—10, Vol. 2.

3. *Executive Initiative of Money Bills.* Section 54 requires that the House of Commons shall not pass any money vote " that has not been first recommended to the House by Message of the Governor-General in the Session in which such Vote . . . is proposed." A similar provision had been made in the Act of Union of the two Canadas in 1840 (3 & 4 Vict. c. 35). The effect of this is to ensure Ministerial initiative in money bills.

4. *Powers of the Prime Minister.* Sir Ivor Jennings quotes a remark of Gladstone's that the Prime Minister " has no powers, properly so-called, over his colleagues." [14] As far as constitutional law is concerned this statement is strictly true of the Canadian constitution. But certain of the Prime Minister's special powers have been crystallised in written form in a Minute of the Canadian Privy Council. " The Committee of the Privy Council," it runs, " . . . admit the following Memorandum regarding certain of the functions of the Prime Minister." It lays down that " a Meeting of a Committee of the Privy Council is at the call of the Prime Minister," that the quorum of Council for the transaction of business is four, and that no Minister can make recommendations to Council affecting the discipline of another Minister's Department. There are listed certain " special prerogatives of the Prime Minister," which are the dissolution and convocation of Parliament, a wide range of appointments (including Ministers, Privy Councillors, Senators, Committees of Council, and certain judicial offices), and " recommendations in any Department." [15]

5. *Quorum of Council.* Before 1878 the Governor-General's Instructions laid down that the quorum of the Council for the transaction of business was four. When the powers of the Governor-General were put on a more permanent basis in the Letters Patent of 1878, the provision for the quorum was omitted from both the Letters Patent and the Instructions. Since that time there has been no firm provision for a quorum, save recognised custom. The Minute of Council regarding the functions of the Prime Minister firmly asserts that " the quorum of the Council being four, no submission, for approval of the Governor-General, can be made with

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[14] *Cabinet Government* (London, 1947), p. 141.

[15] This Minute is normally passed as one of the first acts of a newly constituted administration. The most recent is P.C. 3374 of October 25, 1935. Mr. Mackenzie King once stated in the House " I may say there is nothing unusual about this particular order. It is one that was first adopted by Sir Charles Tupper when he came into office . . . I have been told to be sure to inform the house that this list does not include all the prerogatives of the Prime Minister." *Canada, House of Commons Debates* (unrevised) March 23, 1936, p. 1436. In 1896 Tupper assumed office with a particularly unruly cabinet and this assertion of authority was probably necessary. Subsequent Prime Ministers have found it useful to reintroduce a similar Minute. A copy is normally sent to each Minister on his appointment to office.

a less number than the quorum." It may be doubted, however, whether a minute of Council is legally enforceable. It should perhaps be called crystallised convention.

6. *Collective Responsibility.* As already noted, collective responsibility looms large in Canada and tends to diminish the authority which might otherwise properly be exercised by Ministers individually. In general it can be said that most delegated legislation emanates, not from ministerial orders but from such collective agencies as the Governor in Council or the Treasury Board. Representation in the Cabinet of "veto groups," which is a consequence of the sectional and federal character of Canadian politics, accounts for centralisation in the Cabinet of so much decision-making. The sectional character of the Cabinet also imposes a peculiar limitation on ministerial authority in that policy proposals which affect one particular province or "veto group" (French-Canadians are the obvious example) really require more than mere concurrence from the recognised Cabinet representative of that group. The point was neatly put in an Order in Council of June 14, 1904, which relieved the General Officer Commanding the Militia of his duties:

> "In the case of members of the Cabinet, while all have an equal degree of responsibility in a constitutional sense, yet in the practical working out of responsible government in a country of such vast extent as Canada, it is found necessary to attach a special responsibility to each Minister for the public affairs of the province or district with which he has close political connection, and with which his colleagues may not be so well acquainted. Mr. Fisher, while sharing with his colleagues that general responsibility already referred to, represents in a particular manner the eastern townships of the province of Quebec. If, when it was proposed to form a new regiment in that district, he interested himself in the work and sought to make the organisation effective, he was not merely exercising a right, he was discharging a duty both to the people and to his colleagues in the Cabinet, who would expect him to inform himself of all the facts and advise them before approval by the Cabinet of this proposed arrangement." [16]

Thus, in the Canadian Cabinet, as a practical matter a third kind of ministerial responsibility interposes itself between the general responsibility of Ministers for policy and the individual responsibility of the Minister for his department. This third responsibility is the right of the Minister who is the recognised representative of his district or province to concur in a policy decision of a department which affects his own sectional " constituency."

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[16] Canada, Sessional Papers, 1904, No. 113, p. 2.

TREASURY CONTROL

The federalised character of the Canadian Cabinet leads to collective leadership and to group organs of decision-making. Even the powers of financial co-ordination and control, which make the Treasury the queen of Government Departments, are in Canada genuinely collectivised. The power of decision in financial priorities is vested in a statutory committee of the Privy Council called the Treasury Board. It was one of the first organs of the Government of Canada to be constituted, having been created by Order in Council P.C. 3 of July 2, 1867. Since 1870 the composition and powers of the Treasury Board have been governed by statute, and they are now contained in the Financial Administration Act, 1951.[17] The Board consists of the Minister of Finance, who is chairman, together with any five Members of the Privy Council (who are in fact Ministers of the Crown), nominated from time to time by the Governor in Council. Its quorum for the transaction of business is three, a requirement apparently first laid down by Order in Council P.C. 2713 of July 13, 1896, by which the Treasury Board for the Laurier administration was constituted. It has the power, subject to the discretion of the Governor in Council, to determine its own rules and methods of procedure. The Financial Administration Act designates the Deputy-Minister of Finance as the Secretary of the Treasury Board, and the Treasury Board is serviced by the Treasury Board Division of the Department of Finance. This is the largest of the five divisions with some thirty officers which deals with Treasury Board matters, and the head of this division (who holds the rank of Assistant Deputy Minister) in fact performs the functions of secretary to the Treasury Board.[18]

The Financial Administration Act provides that the Treasury Board " shall act as a committee of the Queen's Privy Council for Canada on all matters relating to finance, revenues, estimates, expenditures and financial commitments, accounts, establishments, the terms and conditions of employment of persons in the public service, and general administrative policy in the public service referred to the Board by the Governor in Council, or on which the Board considers it necessary to act under powers conferred by this or any other Act." It is further provided that the Governor in Council may authorise the Board to exercise all or any of its powers, save that of appointment, under the Civil Service Act, the Civil Service Superannuation Act, and Parts II to VI of the Royal Canadian Mounted Police Act. Certain of the above powers were accordingly conferred on the Treasury Board by Order in Council P.C. 2644 of May 6, 1952. In general, the Treasury Board deals with three important areas of government policy: the consideration, co-ordination, and preliminary approval of departmental estimates; questions relating to civil service organisation and establishment; and the approval of contracts entered into by Ministers.

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[17] A full and authoritative operational description of the Treasury Board is given in G. W. Stead, " The Treasury Board of Canada " in *Institute of Public Administration of Canada: Proceedings of Seventh Annual Conference, 1955*, pp. 79–112.

[18] " I would like to emphasise, however, that the staff is set up for the assembly, correlation and analysis of facts for presentation to the Board and to express its views and instructions. Unlike the British Treasury, decisions are made not by civil servants but by Ministers." Stead, *loc. cit.*, pp. 82–83.

The first of these functions does not require elaboration. It is simply the normal Treasury supervision over the financial needs and proposals of the departments. The second requires some comment since the Treasury Board shares with the Civil Service Commission authority over public personnel administration. The functions of the Civil Service Commission are not confined to recruitment, but extend to promotion, classification, organisation and methods, and other aspects of personnel administration. But questions of establishment and organisation are subject to the final authority of the Treasury Board. The somewhat ambiguous division of authority over the public service between the Treasury Board and the Civil Service Commission is administratively untidy and is a potential source of difficulty and confusion.[19] A sharp difference over policy objectives might well emerge in a period of sharp contraction in the economy and, consequently, in the public service. It must be said, however, that under present conditions the system works smoothly enough. It is significant that when the Royal Commission on Administrative Classification in the Public Service recommended in 1946 that full authority over establishments and personnel should be given to the Treasury Board, with the concurrent reduction in the functions of the Civil Service Commission to recruitment and appointment, this recommendation was widely criticised and not implemented.

It is evidence of the ubiquity of the issue of " representation " in Canadian politics that one of the most effective sources of opposition to the report was among French Canadian M.P.s. Noting that the Department of Finance had few French Canadians among its officers, they concluded that the bias of the Treasury Board would be so much towards efficiency and economy that the conventionally-established policy of balanced representation in the civil service would be seriously threatened. They felt that the Civil Service Commission, one of whose three members is always a French Canadian, would be more likely to preserve the proper proportion of French Canadians in the civil service.[20] Whether this view was justified or not, the underlying assumption was undoubtedly correct. Efficiency and economy are, no doubt, admirable principles of public administration. In a federal State and a plural community they must yield pride of place to consideration of representation and political stability.

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[19] Taylor Cole, *The Canadian Bureaucracy* (Durham N.C., 1949), pp. 29–32.

CABINET ORGANISATION

Historically, the Cabinet and the Privy Council have been structurally inseparable. It is only recently, with the growing importance of Cabinet committees, the creation of a Cabinet secretariat, and the institution of a system of Cabinet records, that some functional separation between Cabinet and Council is beginning to emerge. It should be noted that there appears as yet to be no serious need to restrict the size of the Cabinet by excluding from it any Ministers. The normal size of the Cabinet in recent years has been twenty. While this appears to be a somewhat unwieldy number for effective deliberation, the necessity for balanced sectional representation would make it extremely difficult in practice to reduce the number of Ministers in the Cabinet. The enormous increase in Cabinet business since 1939 has been met in part by the rationalisation of ministerial deliberation which has resulted from the creation of the secretariat, and from a much fuller use of standing Cabinet and Privy Council committees.

The secretariat was created in the spring of 1940 with the appointment of a Clerk of the Privy Council and Secretary to the Cabinet (the former post had fallen vacant and the opportunity was seized to enlarge the responsibility of the office). The Secretary to the Cabinet was charged with the responsibility, under the direction of the Prime Minister, of preparing Cabinet agenda, keeping records of Cabinet meetings, communicating Cabinet decisions to Ministers and others concerned, and maintaining liaison between the Cabinet and its committees.[21] Since the Prime Minister has usually held the office of

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[20] *Ibid.*, pp. 56–57.

[21] Order in Council P.C. 1121 of March 25, 1940. The description of functions entrusted to the Secretary to the Cabinet was closely modelled on that contained in the Haldane *Report* of the *Committee on the Machinery of Government.* The authoritative account of the origin of the secretariat and of the machinery of the Cabinet in World War II has been given by Mr. A. D. P. Heeney, the first Secretary to the Cabinet, in *Canadian Journal of Economics and Political Science*, Vol. XII, No. 3, August, 1946, p. 287. More recent changes are considered in J. R. Mallory, "Delegated Legislation in Canada," *ibid.*, Vol. XIX, No. 4, p. 462, and in J. R. Mallory, "Cabinet Government in Canada," *Political Studies*, Vol. II, No. 2, p. 142. The addition of the duties of Secretary to the Cabinet to those of the Clerk of the Privy Council was a natural and obvious step. The ministerial office of President of the Privy Council is a near sinecure which has almost always been held by the Prime Minister since 1896, so that the Cabinet secretariat and, more recently, the Prime Minister's private office staff, have grown naturally upon the departmental organisation of the Privy Council Office. There is no separate Prime Minister's Department in Canada, although Mr. St.

President of the Privy Council, the Privy Council Office has become the most convenient place for the development of the central executive machinery. At first, the activities of the secretariat were confined to the War Committee of the Cabinet, but they have since been extended to cover the operations of the whole Cabinet and its committees.

While the usual secrecy surrounds the operation and composition of Cabinet committees, many of them were set up by Order in Council before the creation of the secretariat brought about a growing distinction between Cabinet and Privy Council organisation. Thus the War Committee was set up by Order in Council on December 5, 1939 (a Defence Committee had previously been set up in 1936), a Committee on Legislation was similarly created on the same date, and a Wheat Committee had been first set up on October 31, 1935. With the exception of the War Committee, all of the committees were essentially advisory to the full Cabinet, rather than executive. Even the Treasury Board, whose functions have already been described, is essentially advisory in character, since in general its Minutes require the approval of the Governor in Council to have legal force. If we apply the Ansonian definition of the Cabinet as the " deliberative " body and the Privy Council as the " executive " body, all of the above committees (save the War Committee) are properly Cabinet committees rather than Privy Council committees.

Actually, there are four Privy Council committees which are recognised as such, *viz.*, the Committee of Council (*i.e.*, the full Cabinet), the Special Committee of Council, the Treasury Board, and the Committee on Scientific and Industrial Research. The Treasury Board has already been described: the functions of the others will be noted briefly.

Of the Committee of Council, Professor Dawson has remarked pithily, " The Cabinet, lacking any legal status of its own, masquerades as the Privy Council when it desires to assume formal powers." [22] In other words, the Cabinet may " resolve itself into the Committee of Council " to approve a draft Order in Council for submission to the Governor-General. The Special Committee of Council is the first evidence of the physical separation of Privy Council from Cabinet business. It is a continuation of the Committee on Government business which, during the war, gave prior consideration to a great mass of detailed decisions which were later dealt with without further

Laurent on April 25, 1957, transferred the portfolio of President of the Privy Council to another Minister and thus became the first Prime Minister of Canada to hold no other office than that of First Minister. The *Salaries Act* (which provides for ministerial salaries) has always included " the recognised office of First Minister " so that this arrangement was possible without new legislation. When Mr. Diefenbaker became Prime Minister, however, he took the oath of office as Prime Minister, President of the Privy Council, and Secretary of State for External Affairs.

[22] R. M. Dawson, *The Government of Canada* (Toronto, 1947), p. 201.

extended consideration in Council. This procedure led logically to the elimination of the second stage altogether. The Special Committee is a body of Ministers, presided over by the senior Privy Councillor present, which meets periodically to dispose of the large number of routine submissions to Council which do not raise new questions of policy. This may be because policy is clear from statutes or other Orders in Council, or because the matter has already been dealt with by a Cabinet committee or by the Treasury Board. Normally routine submissions to the Governor in Council are dealt with in the Special Committee of Council, though they may still be dealt with in full Committee of Council if such a course commends itself to the Cabinet.[23]

The Committee on Scientific and Industrial Research was first set up by Order in Council P.C. 1266 of June 6, 1916. It is a ministerial committee whose function essentially is to advise the Cabinet on matters within the field of scientific and industrial research and to supervise the activities of the National Research Council. The latter is both a scientific advisory body and an administrative agency which operates Government research laboratories, and assists research in the universities through grants and scholarships. It reports to Parliament through the Minister of Trade and Commerce.

MINISTERS, PARLIAMENTARY ASSISTANTS AND DEPUTY MINISTERS

The nomenclature of the political and senior permanent officers of the Government of Canada is likely to cause confusion to those unfamiliar with their meaning. The term Minister is clear enough and requires little elaboration. Most of the older designations of the political heads of departments, such as the Commissioner of Crown Lands, gradually fell into disuse as the heads of the older departments came to be known as Ministers. Many of them had been swept away by Confederation though a few, for example, the Controllers of Customs and Inland Revenue, survived until the eighteen-nineties. The Postmaster-General has been a political officer and a member of the Cabinet ever since the post office was transferred to Canadian administration. The Secretary of State is the lineal descendant of the Provincial Secretary of pre-Confederation times.[24] The Department of External Affairs is headed by the Secretary of State for External Affairs. The Minister of Justice is also Attorney-General, and the office of Solicitor-General, which is occasionally left vacant, is a Cabinet post. In general all Ministers are in the Cabinet. On rare occasions particular ministerial posts have been left outside the Cabinet. The only posts which have been so omitted are the Controllers of Revenue and the Solicitor-General.

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[23] It was the Special Committee of Council that the Minister of Public Works had in mind when he informed a bemused House of Commons that " The governor in Council is a committee of the cabinet and not the full cabinet, as some honourable members seemed to think ": *Canada, House of Commons Debates* (unrevised) June 18, 1956, p. 5126.

[24] The offices of Provincial Secretary and Provincial Treasurer still continue in the provinces, though in Quebec the latter has in recent years become the Minister of Finance. In the provinces the office of Attorney-General is an important Cabinet post, frequently held by the Premier. Premier Aberhart of Alberta, who was not a member of the legal profession, assumed the office of Attorney-General in 1937 and held it until his death. Quebec is the only province to have a Solicitor-General in the Cabinet.

Statute and tradition alike require in the United Kingdom that a substantial number of Ministers should sit in the upper chamber. Such a requirement is absent in Canada, and, in fact, it is now rare to find a departmental Minister in the Senate. The only members of the Government in the Senate between 1935 and 1953 were Ministers without Portfolio (usually only one) in order to have a member of the Cabinet as Leader of the Government in the Senate. In January, 1953, a Senator was made Solicitor-General, but this does not violate the modern usage that all departments should be represented in the Commons by their Ministers, since the Minister of Justice sat in the House of Commons.[25]

During and after the First World War a few Parliamentary Secretaries were appointed to assist some Ministers, but thereafter these posts were discontinued. Since 1943 a similar, but not identical, post has emerged—that of Parliamentary Assistant. Parliamentary Assistants are not members of the Cabinet, nor are they sworn of the Privy Council. All are members of the House of Commons. They may not be appointed until their writs of election have been returned, and their appointments lapse upon the dissolution of Parliament. They are never included in official lists of the Ministry and are not regarded as being in the ministerial category. The duties which they perform for their respective Ministers are largely parliamentary, though in practice particular Ministers may in fact ask their Parliamentary Assistants to assume some part of the political supervision of a department.[26]

The permanent head of a department in Canada is officially the " deputy head " or, as he is usually styled, the Deputy Minister. The term is often confusing to outsiders, since it implies that a Deputy Minister can act in place of the Minister. However, the title has a long history in Canada, and Canadians may be pardoned for seeing no reason to change it to agree with the terminology of other countries. The first formal use of the term is in the Civil Service Act of the Province of Canada (20 Vict. c. 24, 1857), and the use of the term

[25] All of the provinces, except Quebec, have unicameral legislatures.

[26] Mr. Mackenzie King gave a full statement on the character of these appointments in *Canada, House of Commons Debates,* April 20, 1943, pp. 2342 *et seq.* The only province which has appointed Parliamentary Assistants is Quebec.

" deputy head " to designate the senior permanent official is of even earlier origin.[27]

MINISTERS' POWERS AND DELEGATED LEGISLATION

It is unusual in Canada for the legislature to delegate substantial regulation-making powers to individual Ministers. The normal practice is to confer such powers on the Governor in Council. This is in part the result of deep-seated habit, in part a reflection of the character of Cabinet Government in Canada, with its recognition at every turn of the importance of collective decisions by bodies which embody sectional interests. Delegated legislation is therefore primarily by Order in Council. Departments and Crown agencies of various sorts do have the power to make orders, and some recent statutes, *e.g.*, the Defence Production Act, confer sweeping powers on the Minister.

The number of orders emanating from the Governor in Council and from departments and other Crown agencies which are of substantive legislative character became very large during the war years and has not greatly diminished since. Consequently, concern with procedures of rule-making which ensure adequate and systematic publication and parliamentary review has grown since the end of the war. Before 1939 there was no general requirement for the publication of delegated legislation. Certain designated orders were required to be published in the *Canada Gazette*, but in general the decision to publish an order rested with the Minister of the originating department.[28]

The outbreak of war greatly increased the number of Orders in Council, and it was important that many of these rules be given wide publicity. Accordingly, regulations made under the War Measures Act were published at regular intervals in forms convenient to the public and to those required to carry the regulations out. At the same time, the Government introduced the practice of tabling all orders relating to the war in Parliament at the beginning of each session. The wartime habit of publishing and tabling regulations became sufficiently fixed that it continued after the war was over. Since January 1, 1947, " all proclamations, orders, rules and regulations of a legislative character or of an administrative character having general effect or imposing a penalty " have been published fortnightly in Part II of the *Canada Gazette*.[29] These provisions were put in statutory form in the Regulations Act (1950, S.C., 1950, c. 50).

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[27] Professor Hodgetts suggests that the term arose in the period when certain departments, controlled from Whitehall, operated in Canada. Thus the Deputy Postmaster-General for British North America was regarded as a permanent official. See J. E. Hodgetts, *Pioneer Public Service*, p. 92.

[28] See J. R. Mallory, " Delegated Legislation in Canada," *Canadian Journal of Economics and Political Science*, Vol. XIX, No. 4, November, 1953, p. 462.

The requirements for publication in *Statutory Orders and Regulations* are similar to those provided in the United Kingdom Statutory Instruments Act. Practically all delegated legislation is required to be published and tabled in Parliament. The Governor in Council may exempt a regulation or class of regulations from the above requirements, but any such exempting order must be published in Statutory Orders and Regulations.

Provision for publication is in substance the same as that in the United Kingdom. Provision for parliamentary scrutiny is not. There is no provision for parliamentary approval of delegation, by resolution or otherwise, and there is no select or standing committee of either house charged with the responsibility of examining statutes or instruments. When the Regulations Bill was under consideration the Prime Minister (Mr. St. Laurent) announced that after consideration the Government had decided that such a committee would not be necessary in Canada " because most of the statutory regulations have to be made by the Governor in Council, and that gives considerable time for checking, whilst in the United Kingdom most of these things are done by boards or other agencies of the Crown. No one who is responsible to Parliament or to the public hears of these regulations until they have become law." [30] He added that the United Kingdom committee had only limited terms of reference " that probably would not fit our situation." It is perhaps natural that Ministers may think that careful ministerial review is a sufficient substitute for parliamentary consideration—those who are neither Ministers nor senior officials are likely to think otherwise.

Since that time two concessions in the direction of parliamentary scrutiny of delegated legislation have been made by the Government. Both special safeguards are inserted in specific pieces of legislation. The first was the provision, contained in the Emergency Powers Act, 1951, that any order or regulation made under the Act might be annulled by resolution of the House of Commons and the Senate within forty days of the date on which the orders were tabled. When members of the Opposition objected that there was no opportunity under the Rules for such a resolution to be brought in or considered, the Government gave an undertaking that such time would be provided. In fact no occasion has arisen for a resolution to be moved, and the Act itself (which was for a limited period) was allowed to lapse when the time expired.

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[29] This quotation is from the Prime Minister's statement on second reading of the Regulations Bill. *Canada, House of Commons Debates* (unrevised) May 31, p. 3039. Until the passage of the Regulations Act, the publication of regulations had been provided for by the Governor in Council under the authority of the *Public Printing and Stationery Act.* There had been widespread criticism in Parliament and elsewhere of the " secret " Order in Council of October 6, 1945, which had authorised the Minister of Justice to apprehend and interrogate persons suspected of Communist espionage. This probably hastened the provision for systematic publication.

[30] *Canada, House of Commons Debates* (unrevised), May 31, 1950, p. 3040.

In 1950, as part of a number of changes in the National Defence Act (R.S.C. c. 184), a new section 33 was inserted which required that whenever the Governor in Council places the Canadian forces or any part of them on active service, Parliament shall meet within ten days. Accordingly when, by Order in Council on November 20, 1956, authorisation was given to place certain military, naval and air units in the United Nations Emergency Force in the Middle East, Parliament was summoned in special session and met on November 26. This rather singular provision reflects the peculiar sensitiveness of many Canadians to sending troops overseas. It is a reflection of the conscription crisis of both World Wars, and an enactment of the soothing doctrine of Mackenzie King that, if Canada, were to be confronted with war, then " Parliament would decide."

There is no provision in the National Defence Act that any special procedure should be followed to ensure parliamentary review of the events that led up to the commitment of troops. It was apparently assumed that sufficient opportunity for consideration would be provided by the Throne Speech Debate and in the consideration of further supply. In this case, it was discovered that the cost of the forces in question could be borne on the existing defence appropriations so that no supply debate would be necessary. The Government was apparently prepared to bring down a nominal supply vote to provide an opportunity for debate. In fact, however, the session was something of an anti-climax, for Parliament adjourned after a four-day debate.

Cabinet Government in the Provinces

Structurally, the Cabinets of the provinces reveal their common origin with the Federal Cabinet. In all of them the fusion of the Cabinet and the Committee of Council provides a convenient device for translating policy decisions into executive acts. In general, provincial executives reveal practically all of the stages in the evolution of Cabinet machinery since confederation. Over those in some provinces hangs a somnolent Victorian air, quite unsullied by the abolition of political patronage or the development of efficient procedures for ensuring strict financial probity. In others appear some or all of the bustling devices of the twentieth century which have so transformed the atmosphere of Cabinet government in Ottawa in the past fifteen years.

Perhaps only in one respect do they differ essentially from Federal Cabinets. Sectional pressures and the permanence of sectional veto groups has produced within the Federal Cabinet a genuine " diffusion of power." [31] The provincial executives govern more homogeneous and unified communities, and consequently the pattern of responsibility is less complicated. All are characterised by a considerable concentration of power in the Prime Minister, or a small inner group of influential Ministers. This tendency is strengthened in the smaller provinces by a low level of ministerial salaries and a grouping of portfolios under a single Minister. The Cabinet will thus include several clearly part-time Ministers who retain private business interests, but necessarily sacrifice political influence in the Cabinet to the few Ministers who carry the burden of the more important departments. In consequence, the provincial premier who has a strong personality and great energy may be in fact a one-man administration. Conspicuous examples of this type in recent years are William Aberhart in Alberta (1935–1943), Mitchell Hepburn in Ontario (1934–1942), and Maurice Duplessis in Quebec (1936–1939 and since 1944). It is significant that in Quebec it is the Premier, not the Minister of Finance, who is *ex officio* chairman of the Treasury Board. In Prince Edward Island it appears that the Treasury Board functions openly as a sort of " inner Cabinet " and " a convenient justification for dispensing with the services of the whole Cabinet." [32]

The character of party systems in the provinces brings about marked differences in the operation of both parliamentary and Cabinet government. The chaotic politics of British Columbia, which has never cheerfully accepted a two-party system on national lines, has modified from time to time the normal operation of Cabinet government. In British Columbia, as in Manitoba, coalition Governments have eroded the clear lines of collective responsibility which Cabinet government requires. In the prairies, the powerful impact of agrarian reform movements with their distrust of party politicians and their firm belief in constituency autonomy has undermined party discipline and weakened the unity and authority of Cabinets. New parties have been nourished in the west. Alberta has been lost, in provincial politics, to the national parties since 1921. The Social Credit Party, which has held Alberta since 1935, was able to extend its control to British Columbia in 1952. Saskatchewan has been governed by a Co-operative Commonwealth Federation administration since 1944, and only Manitoba remains in the hands of the older parties, and even there the administration retains the name of "Liberal Progressive." Quebec, though safely Liberal in federal elections, steadily supports the professedly purely provincial Union Nationale of Premier Duplessis in provincial politics.

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[31] The phrase was used by Sir Georges-Étienne Cartier in discussing the question of representation in the Cabinet on April 3, 1868: *P.A.C. Canadian Parliamentary Debates*, 1866–1870.

[32] Frank MacKinnon, *The Government of Prince Edward Island* (Toronto, 1951), p. 176.

Landslide elections, which have enfeebled and even in one case eliminated the Opposition in the legislature,[33] have weakened the bonds of Cabinet discipline in some provinces. There were cases in Prince Edward Island in the 1940's of Ministers openly opposing Government measures on the floor of the legislature,[34] while in Manitoba in 1940 (under a war-time all-party coalition) the Premier and some Ministers abstained on a Bill introduced by one of their colleagues.[35]

The relative success of "splinter" parties in provincial politics has occasionally given rise to fears that the national party system is breaking down. But although the C.C.F. and Social Credit parties have been able to hold about a fifth of the seats in the House of Commons, the " old-line parties have stubbornly continued to survive. Only twice have third parties managed to hold the balance of power in the House of Commons—in 1925 and in 1957. The general election of 1926 produced a majority party, and it is more than likely that the present House of Commons will be succeeded by one with a more normal configuration of parties. The persistent strength of third parties in some of the provinces has not carried over from provincial to national politics, so that Cabinet Government still operates under the assumptions of the two-party system. The infrequent inconvenience of a minority government seems to be preferable to the perils of coalition. In this respect, at least, Canadian politics is still played out according to the standard rules.

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[33] This happened in Prince Edward Island in 1935.

[34] Frank MacKinnon, *op. cit.*, pp. 190–194.

[35] H. McD. Clokie, *Canadian Government and Politics*, pp. 208–209.

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This digest, which has been compiled by the Editor, covers the period from April 1, 1957, to June 30, 1957.

UNITED KINGDOM

COURTS

Account

Supreme Court of Judicature. The Account of receipts and expenditure of the Accountant-General of the Supreme Court, in respect of the funds of suitors of the Court, in the year ended February 29, 1956, has been published; also the statement of liability of the Consolidated Fund; also, the Account of the National Debt Commissioners for the same period, in respect of funds held by them on behalf of the Supreme Court; together with the Report of the Comptroller and Auditor General thereon (H.C. 112 of 1956–1957).

Legal Aid

Account of the receipts and expenses of The Law Society paid into and out of the Legal Aid Fund, 1955–1956, has been published; together with the Report of the Comptroller and Auditor General thereon (H.C. 146 of 1956–1957).

Magistrates' Courts

Statutory amendment. The Magistrates' Courts Act, 1957 (5 & 6 Eliz 2, c. 29), received the Royal Assent on June 6, 1957. Its primary object is to give effect to the recommendations of the Departmental Committee on the Summary Trial of Minor Offences (Cmd. 9524).

See also TOWN AND COUNTRY PLANNING (below p. 275), **Australia** (below p. 278), **Rhodesia and Nyasaland** (below p. 282).

CRIMINAL LAW

Statistics

Scotland. The statistics relating to police apprehensions and criminal proceedings in 1956 have been published (Cmnd. 157).

CROWN LIABILITY

Contract

Post Office. A company handed two postal packets to the Post Office for registration and transmission overseas, receiving for each a certificate of posting in common form, on which was printed an extract from the Post Office Guide, stating, *inter alia,* that compensation for loss or damage was limited to £2 18s. 0d. The packets were stolen by a servant of the Post Office while in transit. The company brought an action to recover damages, alleging, *inter alia,* breach of contract. On a preliminary question of law whether there was any contract as alleged, the Court of Appeal *held* that there was no contract between the Post Office and the company. The possibility of any contractual tie, express or implied, was excluded by the terms of the relevant statutory enactments, and in particular by section 13 of the Post Office Act, 1908, and regulation 61 of the British Commonwealth and Foreign Post Warrant, 1948. If no contract otherwise existed, the terms of the Post Office Guide could not create such a contract: TRIEFUS & CO., LTD. *v.* POST OFFICE [1957] 3 W.L.R. 1.

EDUCATION

Debate

On April 5, 1957, the House of Commons debated a general motion on education (568 H.C. Deb. 683–778).

Independent schools

Registration. Regulations have been made requiring the person or body of persons responsible, or proposing to be responsible, for the management of an independent school, to inform the Registrar of Independent Schools, annually, of the number of pupils by sex and age groups, the number of boarders by sex groups and the teaching staff (S.I. 1957 No. 929). Similar regulations have been made for Scotland (S.I. 1957 No. 1058).

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Civil Service

Staffs employed. A statement has been issued showing the numbers of the Civil Staffs employed in Government Departments on April 1, 1957, as compared with January 1, 1957. It shows a total of 635,656 (including 251,583 Post Office staffs) on the later date, which is a decrease of 1,767 (Cmnd. 184; see also [1957] P.L. 154).

Companies

Report. The General Annual Report of Companies, 1956, has been published by the Board of Trade (H.M.S.O. 51–27–0–56).

Home Secretary

Police. On May 29, 1957, the House of Commons debated on the adjournment the question of the powers of the Home Secretary over the police forces (571 H.C. Deb. 567–578).

Inspectorate

Constabulary. The 94th Report of Her Majesty's Inspector of Constabulary for Scotland for 1956 has been published (Cmnd. 172).

Mental Health

Report. The Report of the Royal Commission on the law relating to Mental Illness and Mental Deficiency has been published. The Commission recommends a number of changes in the present law the main objects of which would be to put mental patients as far as possible on the same footing as patients with other forms of illness or disability, to bring administrative methods up to date, and to revise terminology. Mental Health Review tribunals should be set up on a regional basis so that patients and relatives can, if they wish, ask for an independent investigation into the need for their detention. The Board of Control should be abolished. Local authority services should be expanded. (Cmnd. 169; and see 571 H.C. Deb. 888–889 June 3, 1957).

Ministers' Functions

Atomic Energy. An Order in Council has been made transferring to the Prime Minister the functions hitherto performed by the Lord President of the

Council under the Atomic Energy Act, 1946, the Radioactive Substances Act, 1948, and the Atomic Energy Authority Act, 1954 (S.I. 1957 No. 561; and see SUBORDINATE LEGISLATION (below, p. 274)).

Burden on Ministers. The Prime Minister stated that he had asked a small group of Privy Councillors (Lord Attlee, Lord Crookshank, Mr. Clement Davies, Mr. J. Stuart and Mr. Ede) to give some preliminary study to the question of the burden on Ministers; that their inquiry would be informal and, after their report, he would consider, in the light of their recommendations, whether a more formal type of inquiry would be profitable. The Prime Minister stated that he would consider allowing this Committee to consider the burden on Members of Parliament after it had dealt with the burden on Ministers (570 H.C. Deb. 1038, 1045–1047, May 21, 1957).

Department of Health for Scotland. The Report for 1956 has been published (Cmnd. 140).

Housing and Local Government. The Report of the Ministry for 1956 has been published (Cmnd. 193).

Misdescription of Fabrics. An Order in Council has been made transferring to the President of the Board of Trade the functions hitherto performed by the Secretary of State under the Fabrics (Misdescription) Act, 1913 (S.I. 1957 No. 1077).

Patents, Designs and Trade Marks

Report. The 74th Report for 1956 of the Comptroller-General has been published (H.C. 179 of 1956–1957).

Research

Medical Research Council has issued its Report for the year 1955–1956 (Cmnd. 180).

National Research Development Corporation. The Account has been published of the sums issued out of and received from the Consolidated Fund and of the sums received from the Corporation in respect of interest and repayment of advances, and of the disposal of those sums, respectively, for 1955–1956; together with the report of the Comptroller and Auditor General thereon (H.C. 164 of 1956–1957).

Security

Telephone communications (*interception*). On June 6, 1957, the Home Secretary was asked in the House of Commons in what circumstances he had authorised the police to supply the Bar Council, in connection with a disciplinary matter affecting a barrister, with transcripts of intercepted telephone conversations in the London area. Mr. Butler replied that the material in question was obtained under the authority of a warrant of the Secretary of State and related to the case of a notorious and self-confessed criminal; that it was disclosed to the Bar Council in response to a request from the Council for assistance in inquiries which they were making into complaints about the professional conduct of a particular barrister; that the Member who asked the question could be assured that the Secretary of State only acted in this way when he realised that the public interest necessitated such action; that this action would never be used except in the interests of public order; that he was not prepared to go into detail in this matter, which derived from the Prerogative and which was a power that he should exercise at his discretion; that he considered that the circumstances of this case justified the action that was taken (571 H.C. Deb. 1469–1471; see also 1487–1497, 1500–1501).

On June 7, 1957, the Home Secretary made a statement and answered further questions. He said that the prerogative power of intercepting telephone communications could be used only by the personal authority of the Secretary of State; that this power was one which Parliament had always recognised to be essential for the protection of society; that it was used solely in cases involving the security of the State, or for the purpose of detecting serious crime; that information from this source was jealously guarded and it was settled principle that it was not disclosed to persons outside the public service: that the circumstances of this case were, however, wholly exceptional; that it was represented to the Secretary of State that the disclosure of this information to the Bar Council was desirable in the interests of maintaining our high standard in the administration of justice and that the Secretary of State felt it to be his duty to supply to the Bar Council information which had already been obtained; that he must make clear that this case would not be treated as a precedent; that Her Majesty's Government appreciated to the full the necessity of preventing any abuse of this necessary but distasteful power; that the decision was taken by his predecessor as Secretary of State; that in his (Mr. Butler's) opinion, the general principle that this sort of information was not disclosed to persons outside the public service should be the line of conduct in future; that there was no question of using this power to obtain information about what passed between a lawyer and his instructing solicitor or a member of the legal profession and his client; that the power was used to detect serious crime and would never be used for prying into confidential communications between an accused person and his legal advisor (571 H.C. Deb. 1573–1579; see also 572 H.C. Deb. 413–424, June 27, 1957).

On June 28, 1957, it was announced that a committee composed of Sir Norman Birkett, Lord Monckton and Mr. Patrick Gordon Walker, would inquire into the practice. The three members of the investigating Committee are Privy Councillors and their terms of reference are " to consider and report upon the exercise by the Secretary of State of the executive power to intercept communications and, in particular, under what authority, and to what extent, and for what purposes this power has been exercised and to what use information so obtained has been put; and to recommend whether, how, and subject to what safeguards, this power should be exercised, and in what circumstances information obtained by such means should properly be used or disclosed."

Universities. In the course of a debate in the House of Lords on May 22, 1957, Lord Chorley referred to " the intrusion of the security services " into the universities and said that these services had been calling upon university teachers to disclose information not only about their students but, more and more frequently now, about their colleagues. On May 29, 1957, Lord Chorley made a personal statement in the House. He said that he had been widely reported in the Press as having stated that a teacher had been asked to find out what documents a colleague had in his room. Lord Chorley said that he did not intend to convey that this had actually happened but that this was the sort of thing that would be likely to happen if this type of method were used; that he had sent to the Minister of Education the name of his informant—a lecturer in the University of London—on the more serious of the charges he had made (203 H.L. Deb. 1122–1124; 204 H.L. Deb. 59–61).

On May 28, 1957, the Prime Minister stated that special inquiries were made about the identity of Government staff to be employed on exceptionally secret work; that if an individual were a university man, inquiries were usually made from his tutors since they were in a unique position to give information, favourable or otherwise, about him, needed to help those responsible for deciding whether he was fit to be employed on such work (571 H.C. Deb. *20–21*).

On June 6, 1957, the Home Secretary stated that in addition to special inquiries, investigations had also to be undertaken in the universities as elsewhere from time to time to protect the security of the State; that it would not be in the public interest to disclose the nature of the arrangements made to carry out these investigations but that no significant changes or extensions had been made in the last twelve months (571 H.C. Deb. 1465–1467).

On June 7, 1957, the House of Commons debated the question of security services in the universities on the adjournment. On the investigations, as distinct from the inquiries, the Joint Under-Secretary of State for the Home Department stated that he recognised that a student's political activities must be viewed in relation to the other activities of a man or girl of that age; that free speculation was the essence of university life and that it would be a very great loss if anything occurred to impair that freedom, as it would be if the confidential relationship between tutor and student were destroyed; that there was no justification for any apprehension that a spy was planted in every common room, nor for the belief that university teachers were encouraged to spy upon their colleagues or their students (571 H.C. Deb. 1580–1594).

See also LOCAL GOVERNMENT (below p. 257).

HIGHWAYS

New streets

Statutory amendment. The New Streets Act, 1951 (Amendment) Act, 1957 (5 & 6 Eliz. 2, c. 33) will come into force on September 6, 1957. Section 1 provides for cases where private street works are carried out otherwise than at the expense of the local authority: in such cases any sum previously paid by the frontagers in respect of such works is to be refunded and any security for payment of such a sum is to be released. Section 2 provides for the adoption of a private street in which street works have been carried out otherwise than at the expense of the local authority. Section 3 deals with the power of a local authority to enter into agreements for the making up of roads under the Public Health Act, 1878, s. 146. Certain matters specified in section 4 are to be registered as local land charges. Sums paid by owners of land to local authorities under section 1 of the 1951 Act are to carry interest (s. 5). Section 6 makes miscellaneous amendments to the 1951 Act.

This Act does not extend to Scotland or to Northern Ireland.

Right of way

Statutory powers. The House of Lords affirmed the decision of the Court of Appeal (see above, p. 276) affirming the decision of the Divisional Court (see above, pp. 169–170) in BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL; SAME *v.* WORCESTERSHIRE COUNTY COUNCIL [1957] 2 W.L.R. 1032.

HOUSING

New Towns

On May 9, 1957, the House of Commons debated on the adjournment the operation of section 9 of the Housing Subsidies Act, 1956, which permitted the Minister to recover from the exporting authorities to new towns half the rate contribution or £4 whichever was the less. Before the Act, exporting authorities could decide which families they would nominate, that is, for which families they would make a rate contribution and for which they would not. Generally, exporting authorities paid the contribution for families who were on their housing waiting lists and were in acute housing need, or for families from council houses or requisitioned properties. Under the Act the exporting authorities lost this discretion. The Parliamentary Secretary to the Ministry of Housing and Local Government stated that it had been decided that 50 per cent. of the £8 subsidy should be paid by the exporting authorities as reflecting the 50 per cent. of those exported who were in housing need; and that he thought this formula was reasonable (569 H.C. Deb. 1341–1350).

Rents

Statutory amendment. The Rent Act, 1957 (5 & 6 Eliz. 2, c. 25) came into force on July 6, 1957. The Act revises the maximum rent recoverable from a tenant under a controlled tenancy (sections 1–10). It releases from control dwelling-houses the rateable value of which on November 7, 1956, exceeded £40 in London or Scotland and £30 elsewhere, and tenancies created by lease or agreement after July 6, 1957, with exceptions (section 11). There are provisions as to premiums (sections 13–15) and others miscellaneous and supplemental. See also LOCAL GOVERNMENT (below p. 258); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below p. 276).

Standard of fitness

Landlords served a notice of increase of rent under section 25 of the Housing Repairs and Rents Act, 1954, upon a tenant who occupied premises which included an underground room which did not conform with the standards required by section 12 (2) of the Housing Act, 1936, and regulations made thereunder by the local authority. The Court of Appeal (Jenkins, Morris and Sellers L.JJ.), dismissing an appeal by the tenant *held* that section 9 (1) of the Act of 1954 amended section 12 (2) of the 1936 Act and as the premises were not defective in any of the ways specified in section 9 (1) the landlords were entitled to increased rent under the provisions of the 1954 Act; LONDON HOSPITAL GOVERNORS *v.* JACOBS (No. 2) [1957] 3 W.L.R. 102.

The appellant council made a closing order under section 12 of the Housing Act, 1936, in respect of the basement of a house within the purview of the Act, the council having made regulations concerning underground rooms with which the rooms in question did not comply, not being above the requisite level and not having the requisite frontal area. The county court judge quashed the order. The Court of Appeal (Lord Evershed M.R., Morris and Pearce L.JJ.) dismissing the appeal by the council *held* that section 9 of the Housing Repairs and Rents Act, 1954, had superseded section 12 of the 1936 Act, and provided the sole standard by which fitness for human habitation was to be judged, and as the rooms in question were not defective in any respect specified in section 9 (1) of the 1954 Act the council had no power to make the closing order. CRITCHELL *v.* LAMBETH BOROUGH COUNCIL [1957] 3 W.L.R. 108; [1957] 2 All E.R. 417.

INQUIRIES

Marketing scheme

It was announced on April 2, 1957, that a sufficient majority of producers had voted in favour of the British Egg Marketing Scheme for it to remain in force. A majority of two-thirds is needed; over 90 per cent. voted in favour (and see above pp. 60, 158).

LOCAL GOVERNMENT

Finance

Borrowing. The Chancellor of the Exchequer stated that in order to shorten the waiting period for local authorities proposing to make stock issues, it had been decided to restore the arrangement in force before 1955 by which local authority stock market issues and placings were made only for amounts of £3 million or more; that this would have the effect of reserving the stock market for those authorities whose needs were larger than could readily be met in the mortgage market and would make room in the mortgage market for the smaller authorities to whose needs it was better suited (571 H.C. Deb. 203–204, May 28, 1957).

Financial loss allowance. New regulations have been made prescribing the maximum amounts, to replace those fixed by 1954 S.I. No. 398, for the financial loss allowance to which members of local authorities are entitled in respect of the performance of their duties (S.I. 1957 No. 1068).

Rating and valuation. The following decisions have been made on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *United Grand Lodge of England* v. *Holborn Metropolitan B.C.* (1957) 50 R. & I.T. 132; *Horace Plunkett Foundation* v. *St. Pancras Metropolitan B.C.* (1957) 50 R. & I.T. 187; *London Transport Executive* v. *Heston and Isleworth B.C.* (1957) 50 R. & I.T. 171; *Parsons Green Club* v. *Fulham Metropolitan B.C.* (1957) 50 R. & I.T. 186); *Newport Playgoers' Society* v. *Newport County B.C.* (1957) 50 R. & I.T. 149; *Renishaw Park Golf Club* v. *Chesterfield R.D.C.* (1957) 50 R. & I.T. 267; *St. Pancras B.C.* v. *University of London* [1957] 1 W.L.R. 778; *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council* (*No. 2*) [1957] 1 W.L.R. 764; *Crosby Hall Association* v. *Chelsea Metropolitan B.C.; British Federation of University Women* v. *The Same* [1957] 50 R. & I.T. 380.

On section 24 (1), Sch. III of Rating and Valuation Act, 1925, and Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480) Sch., Class 4, see *B.P. Refinery* (*Kent*) *Ltd.* v. *Walker* (*Valuation Officer*) [1957] 2 W.L.R. 907.

On the " profits basis " as the method for valuation, see *Mid-Northamptonshire Water Board* v. *Lee* (*Valuation Officer*) [1957] 2 W.L.R. 881.

The Scottish Home Department has published the return of rates in Scotland 1955–1956 and 1956–1957; rateable values 1956–1957; population and area, 1956 (H.M.S.O. 49–282–0–57).

The Ministry of Housing and Local Government has published a list of the members of the Panel of Referees appointed by the Lord Chief Justice in connection with the valuation of hereditaments containing machinery and plant, under section 24 of the Rating and Valuation Act, 1924 (Circular No. 10/57).

Officers

Appointment. The Public Health Officers (Deputies) Act, 1957 (5 & 6 Eliz. 2, c. 19), received the Royal Assent on April 17, 1957. It dispenses with the need to obtain the consent of the Minister of Health to the appointment under the Local Government Act, 1933, or the London Government Act, 1939, of deputies of medical officers of health and deputies of public health inspectors.

Powers

Rent Act, 1957. The Ministry of Housing and Local Government has circulated local housing authorities on their powers with regard to repairs, decontrol provisions, loan facilities and other matters (Circular No. 32/57).

Reorganisation

Functions of County and County District Councils. A White Paper has been published, containing proposals put forward by the Government.

The main purpose of the present proposals is to confer greater responsibility for the management of those public services which most intimately affect the life of the community upon the local authorities which are in the closest touch with the people whom they serve, without undue sacrifice of the economy and efficiency arising from the wider resources in finance and qualified staff usually enjoyed by an administration based on a large area or population.

With this purpose in view, the Government suggest that the councils of the larger non-county borough and urban districts (mainly those with populations of 60,000 or over) should be empowered to claim from the county councils responsibility for the administration of certain aspects of " the domiciliary and a number of other health and welfare services, education, employment of children, classified roads and the bridges thereon, town and country planning, shops, theatres and cinemas, food and drugs, milk and dairies, libraries, weights and measures, fertilisers and feeding stuffs, diseases of animals, licensing of waste food boiling plant, and small holdings." Councils that make a claim in respect of any of these services should be entitled, in the view of the Government, to exercise the relevant powers with a proper measure of independence, subject, however, to the approval by the county council concerned of the broad policy for the service, and of financial estimates, where these would seem to be required.

Outside the larger areas, it is proposed by the Government that the county councils should retain most of the powers that they exercise at present; but that the residue—classified roads and bridges, town and country planning (except for town maps), theatres and cinemas, food and drugs, milk and dairies—should be delegated to the councils of the non-county borough and urban districts, where it is apparent that their staff and equipment are of the requisite standard. In country areas (which, however large, do not form as convenient administrative units as do boroughs or urban districts with a comparable population) the rural district councils would not be entitled to claim, as of right, responsibility for services connected with health, welfare, education, employment of children, food and drugs, town maps, or milk and dairies, although, in certain circumstances, such claims would be considered, and might be granted. The Government also consider that the county councils should retain responsibility for classified roads and for weights and measures in rural districts, in view of the technical requirements of these services and, in the case of the roads, the cost. But apart from these reservations, rural district councils would be on the same footing as the other district councils (Cmnd. 161).

Water

Regrouping of undertakings. The House of Commons in Committee of Supply, on May 22, 1957, debated the regrouping of water undertakings (570 H.C. Deb. 1233–1295; and see [1956] P.L. 377).

See also EDUCATION (above p. 253), GOVERNMENT FUNCTIONS AND APPOINTMENTS (above p. 253), HIGHWAYS (above p. 256), HOUSING (above p. 256), PUBLIC HEALTH (below p. 271), SCOTLAND (below p. 274), TOWN AND COUNTRY PLANNING (below p. 275).

MONOPOLIES AND RESTRICTIVE PRACTICES

Restrictive Practices Court

Appointments. The Lord Chancellor has nominated to be Judges of the Court: Mr. Justice Devlin (President), Lord Hill Watson, Mr. Justice Upjohn, Mr. Justice McVeigh and Mr. Justice Pearson. Other fulltime members are Mr. William Gorden Campbell, F.C.A. (aged 65), Sir Stanford Cooper, F.C.A. (aged 67), Sir Bernard Gilbert (aged 66), Mr. W. L. Heywood (aged 56) and Mr. William Wallace (aged 66). Part-time members are Sir Andrew Clow (aged 67), Sir Godfrey Way Mitchell (aged 66) and Mr. G. H. E. Parr (aged 67).

Direction. The following direction has been sent by the Board of Trade to the Registrar of the Court:

1. The Board of Trade, in pursuance of section 1 of the Restrictive Trade Practices Act, 1956, hereby direct the Registrar to take proceedings before the Court in respect of agreements of which particulars are from time to time entered or filed in the register and which are described in the Schedule hereto (hereinafter referred to as "scheduled agreements") before taking such proceedings in respect of other agreements.

2. Nothing in this direction—

(*a*) shall prevent the Registrar taking proceedings before the Court in respect of an agreement which appears to him to be related in such a way to a scheduled agreement as to make it desirable that they be considered by the Court together;

(*b*) shall prevent the Registrar taking proceedings before the Court in respect of an agreement not described in the Schedule hereto before taking such proceedings in respect of a scheduled agreement which appears to him to have been determined (whether by effluxion of time or otherwise).

Schedule. Agreements under which restrictions (being restrictions by virtue of which such agreements are subject to registration under the Registration of Restrictive Trading Agreements Order, 1956) are accepted by any of the parties in relation to the supply by them, in the course of their business, of goods of any of the following descriptions, namely, bread, corrugated paper, cotton yarns, flour, hard fibre cordage, high conductivity copper semi-manufactures, proprietary medicinal preparations, school milk, shell boilers, structural steelwork, and woollen or worsted pile carpets (568 H.C. Deb. *188–189,* April 16, 1957).

Procedure. The Restrictive Practices Court Rules, 1957, have been made under section 23 of the Restrictive Trade Practices Act, 1956.

These Rules prescribe the procedure to be followed in proceedings before the Restrictive Practices Court.

Proceedings will be begun by a notice of reference issued by the Registrar of Restrictive Trading Agreements, specifying the agreements which are referred to the Court. The notice of reference will be served on all parties to the agreements to which it applies, unless the Court makes a representation order under rule 11 where a numerous class of persons have a common interest in the proceedings, in which case the class will be represented by a trade association or other representative respondent. Rules 15 to 17 enable the Court to exclude any agreement from the notice of reference, to revoke or vary a representation order and to transfer the proceedings to another part of the United Kingdom. Every respondent who wishes to be heard by the Court must, within six weeks after entering an appearance, deliver a statement of his case (rule 18) and the Registrar must deliver an answer within a further six weeks (rule 20). A reply may be delivered in certain cases, after which the Registrar must apply for directions as to the future conduct of the proceedings (rule 33). Such application will normally be dealt with by a Judge of the Court (rule 49) who is given wide powers of direction by rule 36. When a case is ready for final hearing, it will come before a Judge and such other members of the Court as the President may nominate (rule 59). The final hearing will be in open court except where the Court decides to sit in private under the powers conferred by rule 60. Provision is made by rules 61 to 63 for the determination in a summary way of issues substantially similar to those considered by the Court in earlier proceedings. Rules 65 to 75 deal with applications for the discharge of previous orders made by the Court, or by the High Court, the Court of Session, or the High Court of Northern Ireland under section 18 (2) of the Act, and with applications under section 30 of the Act relating to agreements covered by orders made under section 10 of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. Rule 76 enables the Court to award costs in cases of unreasonable delay or other unreasonable conduct. Rule 81 prescribes the procedure to be followed on an appeal from the Court's decision on a question of law. Rule 82 enables all documents to be served by post (S.I. 1957 No. 603).

NATIONAL HEALTH SERVICE

Finance

Accounts of Regional Hospital Boards, Boards of Governors of Teaching Hospitals, Hospital Management Committees, Executive Councils (including Joint Pricing Committees) and the Dental Estimates Board, for England and Wales, for 1955–1956, have been published, together with the report of the Comptroller and Auditor General thereon (H.C. 130 of 1956–1957).

Similar accounts for Scotland have also been published (H.C. 131 of 1956–1957).

Health Services Councils

Reports. The report of the Central Health Services Council, for 1956, has been published, preceded by a statement made by the Minister of Health (H.C. 161 of 1956–1957).

The report of the Scottish Health Services Council for 1956 has been published by the Department of Health for Scotland (H.M.S.O. 49–412).

Reciprocal agreement

Sweden. See below p. 262.

Remuneration

Debate. On April 4, 1957, the House of Lords debated the terms of reference of the Royal Commission on Doctors' and Dentists' Pay (202 H.L. Deb. 1095–1121).

NATIONAL INSURANCE

Benefits

Belgium. A Convention on social security giving reciprocal benefits to British and Belgian subjects was signed on May 20, 1957. Both Governments must ratify the convention and the date of operation will be announced later. The Convention deals with benefits for sickness, maternity, death, unemployment, old age, widowhood, orphanhood, industrial accidents and diseases, and family allowances (Cmnd. 199).

Cyprus. An Order in Council has been made providing for reciprocal social security benefits between the United Kingdom and Cyprus. It covers benefits for marriage, maternity, old age, widowhood, death, sickness, unemployment, and orphanhood (S.I. 1957 No. 855).

Death grant. Regulations have been made amending the N.I. (Claims and Payments) Regulations, 1948, by providing that the time limit for claiming death grant shall be six months (or such longer period as the Minister may determine in the circumstances of any particular case) from the date of the death of the deceased. Provision is also made to abolish the time limit for obtaining payment of death grant (S.I. 1957 No. 578).

The National Insurance Advisory Committee recommended no amendments to the draft of these regulations (H.C. 136 of 1956–1957) which were in accordance with the Committee's recommendations (Cmnd. 33).

Report. The National Insurance Advisory Committee examined the preliminary drafts of the N.I. (Married Women) Amendment Regulations, 1957, and recommended no amendments. The Regulations were therefore laid before Parliament as submitted to the Committee (H.C. 201 of 1956–1957).

Statutory amendment. The National Insurance Act, 1957 (5 & 6 Eliz. 2, c. 26), gives effect to recommendations made by the National Insurance Advisory Committee in a number of recent Reports, in particular those on the Earnings Limits for Benefits (Cmd. 9752), on the Dependency Provisions (Cmd. 9855), and on Death Grant (Cmnd. 33); and makes other amendments.

Section 1 enables regulations to be made under which a retirement pensioner between 65 and 70 (60 and 65 for women) can choose to be treated as not retired, and thus adds to each pension increments by temporarily surrendering his pension and paying contributions during employment or self-employment. Section 2 makes changes in relation to benefits payable to women who, immediately before attaining pensionable age, are entitled to widow's benefit (subs. (1)), widows who remarry (subs. (2)), unemployment and sickness benefit for persons over pensionable age (subs. (2)), and the operation of notices of retirement (subs. (4)). Section 3 deals with benefits payable in respect of adult dependants. Where a person's employment has not been terminated, a day on which he does not normally work will not be treated as a day of unemployment unless he is unemployed or sick on each of his normal working days in the same week (s. 4). Section 5 introduces a new benefit known as a child's special allowance; this will be payable to a woman whose marriage has been dissolved, on her ex-husband's death if she then has in her family a child or children to whose maintenance the ex-husband had been contributing. Section 6 provides that step-parents are not to be regarded as parents for purposes of guardian's allowance, so that a step-parent's existence will no longer prevent payment of the allowance; and makes changes in relation to untraceable parents and otherwise in respect of children. Section 7 makes changes in the basis on which death grant is awarded. Section 8 is intended to enable contributions to be credited during any period of non-employment between entry into insurance and the sixteenth birthday, and also makes it clear that absence from Great Britain does not preclude the crediting of contributions under this provision. Section 9 contains miscellaneous and general provisions about regulations.

The Act is to come into operation on days to be appointed. Section 3 (1) (*b*) (which amends s. 24 (1) of the Act of 1946) was brought into operation from June 24, 1957 (S.I. 1957 No. 989).

Sweden. An Order in Council has been made providing for reciprocal social security benefits in accordance with a Convention signed between the Governments of the United Kingdom and Sweden. The Convention covers family allowances and health services. Sweden is thus the first country outside the Commonwealth to offer full reciprocity with the British health services for all British nationals, including tourists. The agreement covers also benefits for unemployment, sickness, maternity, old age, widowhood, orphanhood, and industrial injury. The arrangements came into force on June 1, 1957 (S.I. 1957 No. 856).

Unemployment. The House of Commons debated unemployment benefits on the adjournment on April 17, 1957 (568 H.C. Deb 2063–2074).

Decisions of the Commissioner and the Tribunal

Availability. A vehicle wing fitter went away on a touring holiday by car. He could give the employment exchange no address and even if a vacancy occurred he would have been reluctant to interrupt his tour. The local tribunal had allowed the claim on the ground that, during the period in question, which was a holiday period for the motor trade in claimant's district, no vacancies for wing fitters would have occurred, no interviews would have been arranged by employers and claimant would have been back in time to take up suitable employment. *Held* that the claimant was not "available" while on holiday. He had made it impossible for those most likely to hear of employment being available for him to communicate with him: Decision No. R(U) 2/57.

Claimant placed restrictions on the hours of employment which she was prepared to accept and in consequence had no reasonable prospects of securing employment. Her restrictions were reasonable within the terms of paragraph (iii) of regulation 6 (1) (*aa*) of the National Insurance (Unemployment and Sickness Benefit) Regulations.

Held that the claimant having satisfied one of the conditions specified in regulation 6 (1) (*aa*), it was not open to the statutory authorities to hold that the claimant was "not available for employment" solely because of a lack of prospects of employment due to the restrictions: Decision No. R(U) 4/57.

Day of unemployment. A claimant normally worked a five-day week but had been on a four-day week for some time with Monday off. In one week there was a customary "fair holiday" on Friday afternoon and Saturday. *Held* that the claimant was not employed to the full normal extent in that week and that the Monday was a day of unemployment (Decision No. R(U) 9/54 not followed): Decision No. R(U) 5/57.

Regulation 6 (1) (*h*) of the National Insurance (Unemployment and Sickness Benefit) Regulations, 1948 (S.I. 1948 No. 1277), as amended, provides: ". . . a day shall not be treated as a day of unemployment if on that day an insured person is following any occupation . . . unless the earnings derived from that occupation, in respect of that day, do not exceed six shillings and eightpence, or where the earnings are earned in respect of a longer period than a day, the earnings do not on the daily average exceed that amount, and unless he is available on that day for full-time employment in some employed contributor's employment and the occupation which he is following is consistent with and different in nature from that full-time employment."

A claimant had a subsidiary occupation as a school caretaker where he was employed for 21 hours a week and earned 12s. 1d. a day. His wife assisted him in this work. It was held that a term could not be implied in his contract, that his wife should assist him and therefore no part of the wages could be attributed to her: Decision No. R(U) 6/57.

Incapable of self-support. The right to a widow's pension under section 18 (3) of the National Insurance Act, 1946, depends solely upon the claimant being "incapable of self-support." The claimant must prove that she is incapable of earning enough to maintain herself at a reasonable standard of living. For this purpose a claimant's requirements are material but her resources other than earnings are not. Therefore, although National Assistance Board scales may provide some guidance they do no more than that.

Due to her physical condition a widow could only work part time from which her net earnings were £2 15s. 4d. a week. The rate of national assistance appropriate to her would have been £2 9s. 0d. a week. *Held* that where a claimant's earning capacity does not amount to £3 a week she should prima facie be held to be incapable of self-support, having regard to the current cost of living: Decision No. R(G) 2/57.

Due to illness a widow was unable to work more than four hours a day, from which she would expect to earn about £3 a week. The rate of national assistance appropriate to her provided an income of £2 19s. 0d. *Held* that the claimant was incapable of self-support. An earning capacity of 1s. more than her national assistance rate was not sufficient to say she was capable of self-support: Decision No. R(G) 3/57.

Late claim. A school teacher claimed maternity allowance in her expected week of confinement. She had married three months earlier. She alleged that the Ministry's leaflet misled her into thinking that only married women paying contributions were eligible for maternity allowance. *Held* that it could not be reasonably inferred from the leaflet that an unmarried contributor was not eligible for maternity allowance. It had not been shown that claimant had reasonably misunderstood information from an official source nor that she had sought information timeously: Decision No. R(G) 15/56.

Marriage. A claimant was married in 1922 to a Swiss who lived in England for many years thereafter but who had obtained a divorce from her in Switzerland in 1948. He still lived thereafter principally in England. *Held* that the Swiss divorce was valid since Switzerland was the husband's domicile of origin and he never acquired an English domicile of choice. The claimant was therefore not entitled to a pension by virtue of his insurance: Decision No. R(P) 1/57.

Misconduct causing loss of employment. Where a claimant was dismissed for absenteeism, though his employment would probably have been terminated at some time, which was uncertain, in the near future for reasons other than misconduct, it was *held* that he must be disqualified for the full period: Decision No. R(U) 1/57.

It is not necessary that the acts or omissions relied upon as constituting misconduct should always arise out of a person's employment. If a person is guilty of such misconduct as would induce or compel a reasonable employer to dispense with his services, on the ground that he was not a fit person to hold his particular employment having regard to that misconduct, he incurs disqualification under section 13 (2) (*a*) of the National Insurance Act, 1946, even though the misconduct is unconnected with his employment.

A lorry driver was dismissed because he ceased to hold a driving licence following conviction for being under the influence of drink whilst in charge of a motor-car. The car was his own and the offence committed after working hours. His employers would have been willing to re-engage him had his licence not been withdrawn. *Held* that he had lost his employment as a result of his misconduct although the offence was not in the course of the employer's business and did not arise out of it: Decision No. R(U) 7/57.

Misconduct in the sense of the Act implies an element of blameworthiness. It may be constituted by mere carelessness; but in considering whether a person has been guilty of misconduct it is necessary to discriminate between that type and degree of carelessness which may have to be put up with in human affairs, and the more deliberate or more serious type of carelessness which justifies withholding unemployment benefit because the employee has lost his employment through his own avoidable fault.

The manager of a branch pharmacy was discharged following the discovery by the management of cash shortages. In Court he was found not guilty of embezzlement. *Held* that the claimant lost his employment through his misconduct. He was dismissed as a result of serious negligence in the discharge of responsible duties. The fact that he was found not guilty of embezzlement was irrelevant: Decision No. R(U) 8/57.

Refusal of suitable employment. Section 13 (5) (*a*) of the National Insurance Act, 1946, provides: "(5) For the purposes of this section, employment shall not be deemed to be employment suitable in the case of any person if it is . . . (a) employment in a situation vacant in consequence of a stoppage of work due to a trade dispute. . . ." If a workman participates in a trade dispute by refusing to do work which—in terms of his employment—he is under obligation to perform. It is not open to him to escape the consequences of that participation by pleading that the work he was called upon to do was "unsuitable employment" by virtue of section 13 (5) (*a*).

A colliery repairer lost employment due to a stoppage of work by the brushers because of a trade dispute. By their contract of employment repairers could be required to work as brushers. They were offered such work but refused it. It was contended that the work offered was not "suitable employment." *Held* that members of claimant's grade were participating in the dispute by refusing to work as brushers, and that section 13 (5) (*a*) of the National Insurance Act, 1946, relating to "suitable employment" has no application to section 13 (1): Decision No. R(U) 41/56.

"Residing with." A widowed mother may claim widowed mother's allowance if her son is "residing with her." By section 78 (3) of the National Insurance Act, 1946, as amended, "two persons shall not be deemed to have ceased to reside together by reason of any temporary absence of either or both of them, and in particular by reason of any such absence at school."

A widow claimed widowed mother's allowance on the ground that her son, aged 16, was residing with her. He had taken a training course in farming and then, in continuation of his training, was placed in employment on a farm for three years. He lived on the farm during the week and stayed at week-ends and holidays with the claimant who bought his motor bicycle, petrol and nearly all his clothes. The claimant lodged with friends and, as her son did not have a room there, special arrangements had to be made to accommodate him. *Held* that the son was residing with his mother: Decision No. R(G) 1/57.

Retirement. The claimant and his son were equal partners in conducting a dairy farm, each being entitled to half the profits. The claimant's activities were reduced following an illness and he had since performed only light duties, the direction of affairs being mainly in his son's hands. Apart from deriving a subsistence from the farm and paying for his occasional holidays out of the profits, he was content to let undrawn profits be turned back into the business. *Held* that the claimant could not be treated as retired. His position was more than that of a mere resident on the farm or a shareholder: Decision No. R(P) 19/56.

Share fisherman—good cause for abstention from fishing. In order to qualify for receipt of unemployment benefit a share fisherman is required to satisfy the conditions prescribed by regulation 14B of the National Insurance (Mariners) Regulations, 1948, as amended. In particular, regulation 14B (2) (*d*) requires proof " that there was no work on or in connection with the fishing vessel available for him on that day for the reason . . . that . . . good cause necessitated abstention from fishing."

A claimant was the member of a crew, of which the engineer reported at 2 a.m. that he could not sail that day because his wife was sick, so that the boat was idle that day because no replacement was available. It was *held* that there was good cause for abstention from fishing: Decision No. R(U)3/57.

Trade dispute. See Decision No. R(U) 41/56 above, p. 264.

Wife—polygamous marriage. A claimant for maternity benefit and her husband were Sikhs and were married in 1938 in what is now Pakistan in accordance with the rites of their religion which allowed polygamy but neither party had contracted a second marriage. It was *held* following Decision No. R(G) 2/56 (see [1956] P.L. 266) that, as the parties were now domiciled in England, a maternity grant was payable: Decision No. R(G) 12/56.

Finance

Report. The Sixth Interim Report by the Government Actuary for 1955–1956 has been published (H.C. 172 of 1956–1957).

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Benefits

Belgium. See above, p. 261.

Sweden. See above, p. 262.

Prescribed diseases. Regulations have been made, amending the N.I. (I.I.) (Prescribed Diseases) Regulations, 1948, so that, subject to certain conditions, a person who has abandoned an occupation as a result of a prescribed disease before the date on which that disease is treated as having developed may, nevertheless, have that occupation treated as his regular occupation for the purposes of a claim to special hardship allowance under section 14 of the N.I. (I.I.) Act, 1946 (S.I. 1957 No. 964).

Decisions of the Commissioner and the Tribunal

Connected condition. The claimant's late husband had during his lifetime been receiving disablement benefit for pneumoconiosis and his loss of faculty was assessed by the medical board at twenty per cent. for pneumoconiosis, described as fully relevant, and ten per cent. for cardiac failure, described as a connected condition. *Held,* on medical evidence, that his death did not result from pneumoconiosis but from cardiac failure and that, as it did not follow that, because death resulted from a connected condition, the death resulted from pneumoconiosis, the claimant was not entitled to death benefit: Decision No. R(I) 4/57.

Dependency. Claimant's son died of a prescribed disease, and the question at issue was whether the claimant was " being to a substantial extent maintained by the deceased, or would but for the relevant disease have been so maintained " as laid down by section 22 (1), as applied by section 56 (1) of the Act of 1946. Regulation 21 of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948 No. 1372) defines " to a substantial extent " as meaning that the contribution to the claimant's maintenance made by the deceased averaged five shillings a week at least. *Held* that the family fund method should be applied to determine whether the claimant was maintained to a substantial extent by the deceased and that the latter's constant attendance allowance should be included as a contribution by him to the family fund so that the claimant was entitled to death benefit: Decision No. R(I) 1/57.

Disablement benefit. Claimant, who had already received injury benefit, was awarded disablement benefit for the same period. *Held* that disablement benefit was payable only on a weekly basis and that the limitation on payments for successive accidents only applied from the Tuesday after it came into operation: Decision No. R(I) 13/57.

" Out of and in the course of employment." Under the Act of 1946, s. 7, a claimant must show, *inter alia,* that personal injury was caused by accident arising out of and in the course of his employment. Claimant, who was a male nurse at a mental hospital, was injured while playing cricket at the hospital. *Held* that, as the game was conducted principally for the benefit of the patients, the accident arose out of and in the course of his employment: Decision No. R(I) 3/57. (Compare Decision No. R(I) 33/54 ([1957] P.L. 168) where the main purpose of a game was to select a staff football team.)

A miner was injured, while leaving the mine in which he worked without permission, because he was wet through. *Held* that the accident did not arise out of and in the course of his employment because the usage which the claimant alleged, that miners, when wet through, could leave without permission, had not been shown to be either notorious, certain or reasonable and because his action in leaving, when he did, was not done for the purpose of, or in connection with, his employer's business: Decision No. R(I) 7/57.

Claimant, a shop steward, slipped and was injured while handing a union card to a fellow employee. *Held* that the accident arose out of and in the course of his employment. An act is not within the scope of employment merely because the workman is permitted or even encouraged to do it in the master's time, but in the present case the business related only to workmen in the particular works concerning a matter in which employers and workmen had a common interest, the maintenance of union members among the employees: Decision No. R(I) 9/57.

Claimant, a postman, was bitten in a street by a dog, who lived at a house at which the postman had no letters to deliver. *Held* that the accident arose out of and in the course of his employment. The postman's employment required him to travel along the street, and this put him in the same position as a man working on his employer's premises: Decision No. R(I) 10/57.

Claimant, a registered dock worker, was injured while travelling, as required by the Dock Workers' Scheme, to a dock labour office to sign on there after failing to get employment elsewhere in the docks. *Held* that the accident arose out of and in the course of his employment: Decision No. R(I) 11/57.

Claimant was injured while travelling to work in a special bus run by a public transport undertaking on a special service to which the public were not admitted. *Held* that the accident arose out of and in the course of his employment within the meaning of section 9 of the Act of 1946 as the bus could not have been said to be operated in the ordinary course of a public transport service: Decision No. R(I) 15/57.

Prescribed diseases. Under the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I. 1948 No. 1371 as amended by S.I. 1949 No. 2316, Schedule), the relevant occupation is described as an "occupation in a factory where nickel is produced by decomposition of a gaseous nickel compound which involves work in or about a building or buildings where that process or any other industrial process ancillary or incidental thereto is carried on."

Claimant was employed in a nickel plating shop. *Held* that prescribed disease 37 (*b*) was not prescribed in relation to him, since nickel was not being produced but being transferred from a nickel ingot on to the article being plated, in the factory where he worked: Decision No. R(I) 5/57.

Pneumoconiosis is prescribed in relation to a claimant only if it can be shown that he has been employed on or after July 5, 1948, in insurable employment in one of the occupations set out in Part II of the First Schedule to the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I. 1948 No. 1371) as amended by 1953 No. 669.

Claimant employed as a gas works stoker from 1937 to 1955 regarded boiler scaling, which is a scheduled occupation, as part of his occupation. Since 1948 he had undertaken boiler scaling on one occasion only; this lasted two days and was on a voluntary basis. *Held* that claimant's occupation did not involve boiler scaling and therefore was not a scheduled occupation. This was the only question for decision by the local appeal tribunal: Decision No. R(I) 8/57.

Under the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I. 1948 No. 1371 as amended by S.I. 1951 No. 305), Sched. I, Pt. I, item 38 (*a*) the relevant occupation is described as "any occupation involving close and frequent contact with a source or sources of tuberculosis infection by reason of employment in the medical treatment or nursing of a person or persons suffering from tuberculosis, or in a service ancillary to such treatment or nursing." Tuberculosis was held not to be prescribed in relation to a claimant who was a disinfector for a local authority and at times came into contact with sources of tuberculous infection: Decision No. R(I) 12/57.

The Commissioner dismissed an appeal after the claimant had ignored an opportunity to produce further evidence. Claimant later did submit further evidence and applied for a review of that decision. *Held* that the decision could not be reviewed. The claimant could have provided the evidence before the decision was given so that when submitted it was not "fresh evidence" which is allowed under section 50 (1) (*a*) of the Act of 1946 to prove a decision was given in ignorance of, or was based on a mistake as to, some material fact: Decision No. R(I) 16/57.

Special hardship allowance. Claimant had suffered injury caused by an accident arising out of and in the course of his employment, but had continued in his employment with numerous absences caused by his injury. *Held* that he had not at all times been incapable of following his regular employment and that as two previous applications had been refused on these grounds, the present one should have been treated as an application for a review of the two earlier ones. Under section 50 (1) (*a*) of the Act of 1950 the previous decisions would only have been reviewed on the ground that they had been given in ignorance of, or were based on a mistake as to, some material fact: Decision No. R(I) 50/56.

Claimant was injured while employed as a trainee pit shaft sinker, and it was clear that he would in any event have been discharged at the end of his training. *Held* that he was entitled to special hardship allowance during his training but not thereafter since his regular occupation was that of a trainee: Decision No. R(I) 6/57.

Claimant's regular employment was that of a bus conductor and, while in that position, he was unable to work overtime because of voluntary work elsewhere. After the accident he ceased to do the voluntary work. It was *held* that it was proper to include the usual overtime earnings of bus conductors in calculating his probable standard of remuneration: Decision No. R(I) 14/57.

Suicide. A claim for industrial death benefit was allowed following suicide where the only medical evidence available showed that the deceased's mental history had been normal until he had contracted dermatitis while employed as a miner. Such a claim will succeed if, even although it cannot be said that the disease caused any *physical* derangement, yet it produced a mental or nervous derangement which led to the suicide: Decision No. R(I) 2/57.

NATIONALISED INDUSTRIES

General

Debate. On April 12, 1957, the House of Lords debated the fuel and power industries (202 H.L. Deb. 963–1015).

Finance. The Chancellor of the Exchequer stated that the total of the overdrafts of the nationalised industries had been reduced from £123 million on August 15, 1956, just prior to the first Exchequer advances, to a figure of £55 million on April 17, 1957, representing their current short-term need (569 H.C. Deb. 800, May 7, 1957; see [1956] P.L. 304–305, 389).

The Secretary of State for Scotland and the Minister of Power, in April, 1957, presented to Parliament a White Paper on capital investment in the coal, gas and electricity industries. This showed that the expenditure incurred and proposed was, in £ million:

	1956		1957
	Approved Expenditure	Estimated Expenditure	Approved Expenditure
National Coal Board	107	96	107
Central Electricity Authority and and Area Boards	195	209	233
South of Scotland Electricity Board	18	17	20
North of Scotland Hydro-Electric Board	18	19	21
Gas Council and Area Boards ...	52	52	59
	390	393	440

(Cmnd. 132).

Airways

Guarantees. The Treasury issued statements of guarantee on loans proposed to be raised by the British European Airways Corporation (H.C. 152 of 1956–1957) and the British Overseas Airways Corporation (H.C. 153 of 1956–1957).

Atomic Energy

Finance. The balance sheet of the Atomic Energy Authority as at March 31, 1956, has been published, together with the report of the Comptroller and Auditor General thereon (H.C. 170 of 1956–1957).

See also **Ministers' Functions** above, p. 253.

Coal

Consumers. On April 1, 1957, the House of Commons debated on the adjournment the subject of domestic consumers' complaints (568 H.C. Deb. 195–204).

Finance. The Account has been published of the sums issued out of and received from the Consolidated Fund and of the sums received from the National Coal Board in respect of interest and repayment of advances and recoupment of Crown expenses and liabilities, and of the disposal of those sums respectively, for 1955–1956, together with the report of the Comptroller and Auditor General thereon (H.C. 145 of 1956–1957).

Organisation. On April 8, 1957, the House of Commons debated on the adjournment the organisation of the coal industry (568 H.C. Deb. 914–934).

Reports. The annual report and statement of accounts of the National Coal Board for 1956 have been published (H.C. 176–I, 176–II of 1956–1957).

See also **General** (above, p. 268).

Electricity

Guarantees. The Treasury has issued statements of guarantee on loans proposed to be raised by the North of Scotland Hydro-Electric Board (H.C. 156 of 1956–1957), the South of Scotland Electricity Board (H.C. 157 of 1956–1957), and the Central Electricity Authority (H.C. 154 of 1956–1957).

Rural supplies. On May 28, 1957, the House of Commons debated on the adjournment rural electricity supplies in Scotland (571 H.C. Deb. 371–378).

See also **General** (above, p. 268).

Gas

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 155 of 1956–1957).

See also **General** (above, p. 268).

Transport

Guarantees. The Treasury has issued statements of guarantees on loans proposed to be raised by the British Transport Commission (H.C. 158 of 1956–1957) and on stock issued by the Commission (H.C. 169 of 1956–1957).

Reports. The annual reports of 1956 have been published of the Central Transport Consultative Committee for Great Britain (H.C. 123 of 1956–1957), the Transport Users' Consultative Committee for Scotland (H.C. 124 of 1956–1957), and the Transport Users' Consultative Committee for Wales and Monmouthshire (H.C. 125 of 1956–1957).

The Ninth Annual Report, Statement of Accounts and Statistics of the British Transport Commission for 1956 have been published (H.C. 187–I and 187–II of 1956–1957).

See also **General** (above, p. 268), TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 276).

PARLIAMENT

Estimates Committee (House of Commons)

Report. The Select Committee on Estimates issued its Third Special Report on Development Areas containing the observations of the Board of Trade and the Treasury on the Second Report of the Committee in 1955–1956, together with the remarks of the Committee thereon (H.C. 135 of 1956–1957); and its Fourth Special Report on H.M. Stationery Office, containing the observations of H.M. Treasury and the Comptroller of H.M. Stationery Office on the First Report of the Committee in 1956–1957 (H.C. 198 of 1956–1957). See above, pp. 172–173.

Members

Disqualification. The House of Commons Disqualification Act, 1957 (5 & 6 Eliz. 2, c. 20), received the Royal Assent on April 17, 1957.

Section 1 (1) specifies six classes of persons who are disqualified for membership of the House of Commons; these six classes are: (a) the holders of specified judicial offices, (b) civil servants, (c) members of the regular armed forces of the Crown, (d) members of public forces maintained by police authorities, (e) members of the legislature of any country or territory outside the Commonwealth and (f) the holders of certain other specified offices. The holders of certain other specified offices are disqualified for particular constituencies (s. 1 (2)). Except as provided in this Act the holding of an office or place of profit under the Crown or the holding of any other office or place is not a disqualification for membership of the House of Commons, and a person is not disqualified for appointment to or for holding any office or place by reason of his being an M.P. (s. 1 (4)). Section 2, Sched. II, regulate the number of holders of Ministerial offices who may at any one time sit and vote in the House of Commons. Section 3 makes it clear that the general disqualification of members of the regular armed forces does not apply to certain members of the reserve and auxiliary forces. Section 4 preserves the character of the Stewardships of the Chiltern Hundreds and the Manor of Northstead as disqualifying offices, so that they will continue to provide the means by which M.P.s are, in practice, able to resign. Section 5 provides for amendments of the list of disqualifying offices by Order in Council after resolutions by the House of Commons. Section 6 specifies the effect of disqualification, so that the election of an office-holder is void and an M.P. who accepts a disqualifying office vacates his seat; but this is subject to the power of the House under section 6 (2) to order that any particular case of disqualification shall be disregarded. Section 7 contains a new provision under which an application can be made to the Privy Council for a declaration that a person is disqualified for membership of the House, the applicant giving security for costs; issues of fact may be referred by the Judicial Committee to the High Court (or to the Court of Session in the case of Scottish constituencies, or to the High Court in Northern Ireland in the case of Northern Ireland constituencies) (s. 7 (4)). No M.P. or person nominated as a candidate for election is to be required to accept any disqualifying office (s. 8). Crown pensioners and Crown contractors are no longer disqualified (s. 9), the House of Commons Disqualification (Declaration of Law) Act, 1931, being repealed. Sections 1–9 (except ss. 2, 4) are applied, with modifications, to the Parliament of Northern Ireland (s. 10). Section 11 amends the Parliamentary Election Rules, contained in the Representation of the People Act, 1949. Section 12 contains a temporary provision about references in the Act to the Minister of Labour. Section 13 is the interpretation section. Section 14, Sched. IV, set out the repeals. The Act does not affect the enactments relating to the disqualification of priests in holy orders and ministers of any religious denomination (s. 14 (3)).

The House of Commons Members' Fund Act, 1957 (5 & 6 Eliz. 2, c. 24), received the Royal Assent on June 6, 1957. It authorises the payment of an annual Exchequer contribution (not exceeding £10,000 or such higher amount as the Treasury may by order direct) to the House of Commons Members' Fund, and extends the investment powers of the trustees of the Fund.

Offices (House of Lords)

Select Committee. The Third Report from the Select Committee on the House of Lords Offices has been published. It concerns fees for the official shorthand writer and temporary reporters, and other matters relating to custodians' allowances, the accountant's office, the library sub-committee and the record copies of Public Acts (H.L. (63) of 1956–1957).

Press

Debate. On May 17, 1957, the House of Commons debated a motion on the state of the Press (570 H.C. Deb. 731–825).

Procedure

Select Committee. The First Report from the Select Committee (of the House of Commons) on procedure has been published, together with the proceedings of the Committee and minutes of evidence. The terms of reference of the Committee were set out at [1956] P.L. 392. The Committee recommends the abolition of the practice of balloting for, and subsequently moving, amendments under S.O. 17 on first going into Committee of Supply upon each of the Service Estimates; that the debates on the Service Estimates should take place on Vote A in Committee of Supply, Mr. Speaker having left the chair without putting any question. On the practice relating to Money Resolutions and the financial responsibilities and duties of the Government, the Committee stated that it would be useful and important if a similar statement to that made in 1937 were now made. The Financial Secretary to the Treasury stated in evidence that the Government still abided by the instructions given in this statement to Departments and Parliamentary Counsel. These instructions were that it was the definite intention of the Government to secure that financial resolutions in respect of Bills should be so framed as not to restrict the scope within which the Committee on the Bills might consider amendments further than was necessary to enable the Government to discharge their responsibilities in regard to public expenditure and to leave to the Committee the utmost freedom for discussion and amendment of details which was compatible with the discharge of these responsibilities (H.C. 110 of 1956–1957).

Public Accounts Committee (House of Commons)

Report. The Committee issued its Second Report, on *virement* between votes of Service Departments (H.C. 190 of 1956–1957).

Universities

Debate. On May 22, 1957, the House of Commons debated the suggestion of an inquiry into the Universities (570 H.C. Deb. 1295–1297, 1352–1359).

See also Government Functions and Appointments (above, p. 255); Subordinate Legislation (below, p. 274).

PUBLIC AUTHORITIES

British Film Fund Agency

An Order has been made which brought into operation section 1 of the Cinematograph Films Act, 1957, establishing the British Film Fund Agency on July 1, 1957 (S.I. 1957 No. 1055).

British Phosphate Commission

Report and accounts for the year ended June 30, 1956, have been published (Cmnd. 133).

Clean Air Council

Appointment. An Order has been made providing for the constitution and procedure of the Council appointed by the Minister of Housing and Local Government under section 23 of the Clean Air Act, 1956. The Council consists of the Chairman, two Vice-Chairmen (the Parliamentary Secretaries to the Ministries of Housing and Local Government and of Power), and not more than thirty members (S.I. 1957 No. 766). The Minister of Housing and Local Government announced the names of twenty-nine members. Ten are members or officers of local authorities; four are members of public corporations for electricity, gas, coal and transport; eleven are drawn from business or industry; one each from Women's Advisory Council on Solid Fuel and National Industrial Fuel Efficiency Service; one past president of T.U.C. General Council; and one professor of fuel technology and chemical engineering (569 H.C. Deb. 772–774, May 7, 1957).

Dental Council

The statutory provisions have been re-enacted in the Dentists Act, 1957 (5 & 6 Eliz. 2, c. 28), Part I (see [1956] P.L. 276).

Employment

Terms of appointment. In 1948 the Northern Ireland General Health Services Board advertised, inviting applications for posts as senior clerks, the appointments being expressed to be "permanent and pensionable." The appellant, having applied, was appointed and was shown the terms and conditions of service. These contained a clause entitled: "Dismissal and reduction in rank, and termination of employment otherwise" and provided: "The board may dismiss any officer for gross misconduct and may dismiss any officer who is proved to their satisfaction to be inefficient and unfit to merit continued employment. Except where an officer has been guilty of gross misconduct, the board shall give at least one month's notice of their intention to exercise their powers of dismissal under this rule. As an alternative to dismissal, the board may order the reduction in rank of an officer who is found by them to be unfit to discharge the duties of the grade in which he has been employed. One month's notice in writing shall be given by all permanent officers who wish to terminate their employment with the board." The only other provision in the conditions with regard to dismissal was one providing that a failure to take the oath of allegiance or failure to honour the oath, if taken, would involve instant dismissal. In 1953 the board purported to terminate the appellant's employment on six months' notice on the ground of redundancy without any suggestion of misconduct or inefficiency on her part. *Held,* that on the true construction of the conditions of employment they were intended to be comprehensive and, as regards determination, exhaustive, and it was not necessary to imply a further power to terminate the contract to give it the efficacy which the parties must have intended it to have; accordingly, the appellant's service had not been validly terminated: McClelland *v.* Northern Ireland General Health Services Board [1957] 1 W.L.R. 594; [1957] 2 All E.R. 129, H.L. (Lords Tucker and Keith of Avonholm dissenting).

See also **Australia** (below, p. 278).

Forestry Commission

Report. The Thirty-seventh Report for 1955–1956 has been published (H.C. 188 of 1956–1957).

Herring Industry Board

Report. The Twenty-second Annual Report, for 1956, has been published (Cmnd. 183).

And see below **White Fish Authority.**

Historic Buildings Councils

Reports. The Annual Reports, for 1956, for England (H.C. 177 of 1956–1957), for Scotland (H.C. 183 of 1956–1957) and for Wales (H.C. 178 of 1956–1957) have been published.

Iron and Steel Holding and Realisation Agency

Accounts of the transactions of the realisation account and of the receipt and disposal of securities coming into the hands of the Treasury or their nominees for 1955–1956, have been published, together with the report of the Comptroller and Auditor-General thereon (H.C. 165 of 1956–1957).

National Assistance Board

Report. The Report for 1956 has been published (Cmnd. 181).

National Film Finance Corporation

Report and accounts for 1956–1957 have been published (Cmnd. 176).

New Towns

Accounts showing the sums issued out of the Consolidated Fund and the advances made therefrom to Development Corporations in England and Wales and Scotland for 1955–1956 have been published together with the report of the Comptroller and Auditor General thereon; and copies of the audited accounts of the Corporations for 1955–1956 (H.C. 171 of 1956–1957).

See also HOUSING (above, p. 256).

White Fish Authority

Statutory amendment. The White Fish and Herring Industries Act, 1957 (5 & 6 Eliz. 2, c. 22), received the Royal Assent on April 17, 1957. Section 1 extends the scope of grants under sections 1 (1) and 6 (1) of the White Fish and Heavy Industries Act, 1953. Section 2 extends the white fish subsidy under section 5 (2) (3) of the Act of 1953. Section 3 empowers Ministers to make grants to the owners or charterers of vessels engaged in catching herring (being vessels not exceeding one hundred and forty feet in length and registered in the United Kingdom). Section 4 provides that the aggregate of grants made under section 5 of the Act of 1953 and section 3 of this Act shall not exceed £17 million or such greater sum (not exceeding £19 million) as the Minister, with Treasury approval, may order.

PUBLIC HEALTH

See PUBLIC AUTHORITIES, **Clean Air Council** (above, p. 271).

PUBLIC NUISANCE

Definition

The Attorney-General, on the relation of a county council and rural district council, claimed an injunction perpetually restraining the defendant company from carrying on the business of quarrying in such a manner as to occasion a nuisance by dust or vibrations. The quarry adjoined a highway, and there were several houses abutting on that highway. Since 1949 there had been constant complaints by persons living near the quarry about the vibration and dust. There was a body of evidence as to personal discomfort. Oliver J. found that the various nuisances complained of still existed and granted the injunctions asked for. *Held* on appeal, any nuisance was "public" which materially affected the reasonable comfort and convenience of life of a class of Her Majesty's subjects and, on the evidence, a nuisance from vibration and dust was sufficiently widespread to amount to a common or public nuisance; therefore, the injunctions had been rightly granted and the appeal failed: ATT.-GEN. *v.* P. Y. A. QUARRIES [1957] 2 W.L.R. 770; [1957] 1 All E.R. 894, C.A.

REMEDIES

Certiorari

". . . the remedy by certiorari is not confined to the parties before the lower court. It extends to any person aggrieved, and, furthermore, to any stranger. The Court of Queen's Bench, by virtue of its inherent jurisdiction over inferior tribunals, has always the right to interfere if it sees that the lower tribunal is going or has gone beyond its jurisdiction, or has acted in a way contrary to law, or appears from the record to have fallen into error in point of law: and it can so interfere, not only at the instance of a party or a person aggrieved but also at the instance of a stranger if it thinks proper. When application is made to it by a party or a person aggrieved, it will intervene (as it is said) *ex debito justitiae,* in justice to the applicant. When application is made by a stranger it considers whether the public interest demands its intervention. In either case it is a matter which rests ultimately in the discretion of the court": *per* Denning L.J.

A local authority granted a licence for a particular pitch in a street market, which had fallen vacant through the death of the former holder, to one of two street traders, and the other appealed to a metropolitan magistrate, who allowed his appeal, granted him a licence, and informed the other trader that the licence issued to him had been wrongly issued. The Divisional Court quashed the magistrate's order on the application of the trader to whom the licence had first been granted. *Held,* on appeal to the Court of Appeal, the magistrate had no jurisdiction under the London County Council (General Powers) Act, 1947, to hear and determine the appeal from the local authority's decision, as the question whether one of two traders should have a particular pitch was one for the local authority to decide; the prescription of a prescribed pitch was a matter for the local authority and there was no provision in the Act for appeal against the refusal of a prescription; the trader, who had applied to the Divisional Court, was a person aggrieved, and, therefore, this was a proper case for the intervention of the court by means of certiorari; therefore, the appeal must be dismissed: R. *v.* THAMES MAGISTRATES' COURT, *ex p.* GREENBAUM (1957) 55 L.G.R. 129, C.A.

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 275).

SCOTLAND

Education

Report of the Secretary of State for Scotland, for 1956, has been published (Cmnd. 162).

See also EDUCATION (above, p. 253).

Local Government

Reorganisation. The Secretary of State for Scotland said that he would not publish a White Paper about the functions of Scottish local authorities; and that he had no evidence of any general demand for a change in the structure of local government in Scotland (569 H.C. Deb. *90,* May 9, 1957).

Wireless and Television

Debate. On May 14, 1957, the House of Commons debated, on the adjournment, the Scottish services (570 H.C. Deb. 367–378).

See also CRIMINAL LAW (above, p. 252); GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 253); NATIONAL HEALTH SERVICE (above, p. 261); NATIONALISED INDUSTRIES (above, p. 268); PUBLIC AUTHORITIES (above, p. 272).

SUBORDINATE LEGISLATION

Parliamentary proceedings

Select Committee on Statutory Instruments (*House of Commons*). On April 16, 1957, the Committee considered forty-two instruments and resolved that it was unnecessary to draw the attention of the House to them. The Committee asked for memoranda from Government Departments in respect of three instruments (H.C. 4—IX of 1956–1957).

On May 7, 1957, the Committee examined twenty-five instruments and resolved that it was unnecessary to draw the attention of the House to them. The Committee asked for a memorandum from a Government Department in respect of one instrument. The Committee drew the special attention of the House to the Transfer of Functions (Atomic Energy and Radioactive

Substances) Order, 1957, on the ground that it appeared to make unexpected use of the powers conferred; and to the National Health Service (Remuneration and Conditions of Service) Amendment Regulations, 1957, and their Scottish counterpart, on the grounds that they appeared to make unexpected use of the powers conferred, and that in other respects their form and purport called for elucidation (H.C. 4—X of 1956–1957).

On May 21, 1957, the Committee examined seventeen instruments and resolved that it was unnecessary to draw the attention of the House to them. The Committee asked for memoranda from Government Departments in respect of two instruments (H.C. 4—XI of 1956–1957).

Special Orders' Committee (*House of Lords*). In the Seventh, Eighth and Ninth Reports the Committee examined seven instruments. The Committee reported that none of them raised important questions of policy or principle; that all could be passed without special attention or inquiry; that four were founded on precedent and three were not so founded (H.L. (65) (67) and (82) of 1956–1957).

TOWN AND COUNTRY PLANNING

Jurisdiction of High Court

Enforcement notice. An enforcement notice is only required to state whether development has taken place without permission or in breach of a condition; it is not necessary to state also why the act specified involves a breach.

The owner of land placed some caravans on the land and applied to the local planning authority for permission to use the land for that purpose. The authority refused permission, but on appeal the Minister permitted the owner to use the land as a caravan site for six months. Two years later, the owner having continued to use the land for caravans, the local authority served an enforcement notice stating that whereas the land was developed by placing thereon caravans for residential purposes and such development was carried out without the grant of planning permission, the local planning authority in exercise of its powers gave notice to remove the caravans within fifty-five days. The owner did not appeal against the notice to a court of summary jurisdiction under section 23 (4) of the Town and Country Planning Act, 1947, but applied to the High Court for a declaration that the notice was invalid because it did not specify the development alleged and because planning permission had been granted. *Held,* (1) that the notice adequately set out the ground of complaint and identified the act which it was alleged constituted the breach; but (2) in stating that the development was without permission the notice ignored the permission, albeit limited, given by the Minister, and therefore the notice was invalid; and the fact that the owner did not appeal to a court of summary jurisdiction did not debar him from applying to the court for relief by virtue of section 24 of the Act of 1947; accordingly the owner was entitled to a declaration: FRANCIS *v.* YIEWSLEY AND WEST DRAYTON U. D. C. [1957] 2 W.L.R. 627; [1957] 1 All E.R. 825, McNair J.

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

Committee. The Committee on Administrative Tribunals and Inquiries (Chaiman: Sir Oliver Franks) has published (1) a further volume of the Minutes of Evidence, for the twenty-seventh day when evidence was given by M. M. Letourneur, Conseiller d'Etat, and Professor C. J. Hamson. (2) Appendix II to the Minutes of Evidence, being supplementary memoranda submitted by witnesses who gave oral evidence.

Disciplinary bodies

Architects' Registration Council. The Discipline Committee of the Architects' Registration Council found the appellant guilty of conduct disgraceful to him in his capacity as an architect in that he combined estate agency with his practice as an architect. The appellant had openly conducted both practices since 1919 and had been registered under the Architects (Registration) Act, 1931, since 1934. In 1949, the committee fixed a date, January 1, 1956, beyond which it ruled it would be considered misconduct to practise in both capacities. *Held,* the proposed rule had no legislative sanction, and it would be wrong to apply the same considerations and standards to those in practice before 1931 as to new entrants; accordingly, it could not be said that the appellant had acted disgracefully because he continued to practise in exactly the same way after registration and after the rule was made as he had done before; consequently, the appeal must be allowed, and the order removing the appellant's name from the registrar must be quashed: HUGHES *v.* ARCHITECTS' REGISTRATION COUNCIL OF THE UNITED KINGDOM [1957] 3 W.L.R. 119; [1957] 2 All E.R. 436, D.C.

Dental committees. The statutory provisions have been re-enacted in Dentists Act, 1957 (5 & 6 Eliz. 2, c. 28), ss. 25–31 (see [1956] P.L. 280–281).

Solicitors' committees. The Solicitors Act, 1957 (5 & 6 Eliz. 2, c. 27), re-enacts the statutory provisions relating to disciplinary matters in sections 46–55.

Mental Health Review Tribunals

Proposal to establish. See GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 253).

Performing Right Tribunal

Procedure. Rules have been made by the Lord Chancellor prescribing the procedure to be followed in proceedings before the Tribunal.

Proceedings will be begun by service of a notice in the appropriate form under Rule 3, and notice of the reference or application to the Tribunal will normally be advertised. Any organisation or person claiming to have a substantial interest in the matter in dispute may apply under Rule 6 to be made a party to the proceedings, and Rule 7 provides for the consideration by the Tribunal of objections to any such application. Under Rule 8 the Tribunal will dispose of references, and applications under section 27 of the Act, after considering any written representations made by the parties or, if so desired, after giving the parties an opportunity of being heard. At any hearing parties may appear in person, or by counsel or solicitor or by any other person allowed by the Tribunal to appear on their behalf. The Tribunal will give its decision in writing and copies of the decision will be made available for public inspection. Rules 18 and 19 deal with the reference of questions of law to the High Court and enable the Tribunal's orders to be suspended in such cases. The Tribunal will have a discretion as to the payment of costs in proceedings before it, while the Second Schedule prescribes a scale of fees (S.I. 1957 No. 924).

Rent Tribunals

Statutory amendment. By section 12 of the Rent Act, 1957, the Furnished Houses (Rent Control) Act, 1946, ceases to apply to the letting of any dwelling with a rateable value which was more than £40 in London or £30 elsewhere in England and Wales on November 6, 1956.

Transport Tribunal

Proceedings have been published in the matter of the application of the British Transport Commission (1957 No. 6), to confirm the British Transport Commission (Passenger) Charges Scheme, 1957, first and second days (88–99–1, 2).

Wool Marketing Board

Natural justice. The pursuer appealed against an appraisal of his wool at 3d. per pound below the maximum price, to the defenders, a tribunal set up under the British Wool Marketing Scheme (Approval) Order, 1950. The appraisers and the pursuer's manager were present when the wool was examined by the tribunal but, when the latter retired to consider their decision, the pursuer's manager was excluded but the appraisers were not. The Court of Session, Inner House, *held* that, although the appraisers had taken no part in the tribunal's deliberations, the tribunal had not acted in accordance with natural justice and its decision must therefore be set aside: BARRS *v.* BRITISH WOOL MARKETING BOARD, 1957 S.L.T. 153.

WALES

See PUBLIC AUTHORITIES (above, p. 271).

WIRELESS AND TELEVISION

British Broadcasting Corporation

Programmes. On April 18, 1957, the House of Commons debated the new B.B.C. proposals for sound broadcasting, affecting the three programmes (568 H.C. Deb. 2156–2178).

See also SCOTLAND (above, p. 274).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial Development Corporation. The annual report and statement of accounts, 1956, have been published. During 1956 the Corporation showed a surplus on its activities of £572,809 (after paying interest of £416,173), an increase of £163,576 compared with the 1955 surplus (H.C. 151 of 1956–1957).

Colonial Territories. The report on colonial territories for 1956–1957 has been published. The main body of the report is preceded by a summary and by a diary of events recorded during the year. Nine appendices provide statistical and other data. In the constitutional and political section the most important events noted are: the achievement of self-government by Ghana; the coming into force of the British Caribbean Federation Act; the progress of the Federation of Malaya towards sovereignty; the negotiation of a new constitution for Singapore; the Report of Lord Radcliffe on Cyprus; and the holding of first elections for African legislators in Kenya (Cmnd. 195).

Colonial Territories and South African Protectorates. The House of Commons debated this question in Committee of Supply on May 6, 1957 (569 H.C. Deb. 644–770).

Commonwealth Development Finance Company. The fourth annual report was published on May 22, 1957, and showed that during the year ended March 31, 1957, the total value of outstanding commitments (investments made or negotiated) rose by £4 million to £14·5 million. Profit for the year, after providing for taxation, was £43,027 (as against £18,470 in 1955–1956) of which £10,000 was transferred to Reserve and £30,000 was written off as preliminary expenses. (The company was incorporated in March 1953, its function having been foreshadowed in a communiqué issued at the end of the conference of Commonwealth Prime Ministers in December 1952. Its purpose is to assist in the finance of sound development projects in the British Commonwealth (including the colonies and dependent territories), particularly those which are likely to assist the sterling area's balance of payments, and for which the normal sources of finance are not readily available.) (Commonwealth Survey, C.O.I., May 28, 1957.)

Commonwealth survey officers. The report of the proceedings of the conference of officers in 1955 has been published by the Colonial Office (Colonial No. 321).

Australia

Courts. It is not permissible under the Constitution of the Commonwealth of Australia for the Dominion Parliament to enact that upon one body of persons—tribunal or court—arbitral functions and judicial functions shall be together conferred.

An order for a writ of prohibition directed against three judges of the Court of Conciliation and Arbitration and the Metal Trades Employers Association was made by the High Court of Australia, prohibiting further proceedings under two orders of a judicial character made by the arbitration court. The orders required obedience by the Boilermakers' Society of Australia to a provision in an industrial award by ceasing to be a party to, or concerned in, a ban on work, and fining the society £500 for failure to comply with the first order. On appeal, *held,* dismissing the appeal, that the provisions of section 29 (1) (*b*) and (*c*) and section 29A of the Commonwealth Conciliation and Arbitration Act, 1904–1952, which purported to vest judicial power in the arbitration court established under the Act with powers of an administrative, arbitral and executive character, were *ultra vires* and invalid: ATT.-GEN. FOR AUSTRALIA *v.* R. AND THE BOILERMAKERS' SOCIETY OF AUSTRALIA [1957] 2 W.L.R. 607; [1957] 2 All E.R. 45, P.C. (This decision is discussed above, p. 198.)

Employment. The Factories and Shops (Long Service Leave) Act, 1953, of the State of Victoria, which imposes upon employers the obligation to grant their employees thirteen weeks' long service leave with pay after twenty years of continuous service and, in certain cases, leave *pro rata* for shorter periods of service, is *intra vires* and valid.

The appellant company was prosecuted at the instance of a factory inspector for not granting a dismissed employee, K., pay for a period of long service leave to which he was admittedly entitled under section 7 (2) of the State Act, if applicable. An award made under the Conciliation and Arbitration Act, 1904–1952, admittedly applied to the company and K., but it was submitted that it was inconsistent with section 7 (2) and therefore inapplicable to the company. *Held,* that the State Act was not inconsistent with the Act of 1904–1951, and the award made thereunder since long service leave was an entirely distinct subject-matter from these matters covered by the award; therefore, although section 109 of the Commonwealth Constitution provided that where a law of the State was inconsistent with the law of the Commonwealth, the latter should prevail, in the circumstances the company was in breach of the State Act in not granting to K. pay to which he was entitled under the Act: CHARLES MARSHALL PTY. *v.* COLLINS (GERALD ALEXANDER) [1957] 2 W.L.R. 600; [1957] 1 All E.R. 923, P.C.

Bahamas

Report. The Colonial Reports, 1954 and 1955, have been published by the Colonial Office.

British Honduras

Report. The Colonial Report, 1955, has been published by the Colonial Office.

Cyprus

Social security. See NATIONAL INSURANCE (above, p. 261).

East Africa

Land and population. On May 31, 1957, the House of Commons debated the report of the Royal Commission on land and population in East Africa (571 H.C. Deb. 771–865).

Report. The annual report for 1956, of the East African High Commission has been published by the Colonial Office (Colonial No. 331).

See also **Rhodesia and Nyasaland** (below, p. 280); **Tanganyika** (below, p. 285) and **Uganda** (below, p. 286).

Gambia

Report. The Colonial Reports, 1954 and 1955, have been published by the Colonial Office.

Ghana

Citizenship. One of the first measures to be enacted by the Ghana Parliament was the Ghana Citizenship Act, which was introduced in the National Assembly in April 1957 and received the Governor-General's assent early in May.

In line with the agreement reached at a Commonwealth conference in 1947, citizens of Ghana will acquire the status of Commonwealth citizens in addition to their nationality and citizenship of Ghana. Under the provisions of the Act, Ghana citizenship can be acquired by:

(1) citizens of the United Kingdom and Colonies and British protected persons born in Ghana, at least one of whose parents or grandparents was born in Ghana;

(2) citizens of the United Kingdom and Colonies and British protected persons born outside Ghana, one of whose parents was born in Ghana and is, or would have been if still alive, a citizen of the United Kingdom and Colonies or a British protected person;

(3) citizens of the United Kingdom and Colonies or British protected persons by virtue of marriage whose husbands become, or would if still alive have become, citizens of Ghana.

Persons born in Ghana after the date of the commencement of the Act become, with a few exceptions, Ghana citizens by birth, and a person born outside Ghana, whose father is a citizen otherwise than by descent, or whose mother is a citizen by birth, becomes a citizen of Ghana by descent. Commonwealth citizens and British protected persons who have been ordinarily resident in Ghana for at least four years, or who are in the service of the Government, can become citizens by registration, and minor children of citizens may also become citizens by registration. Provision is made for the naturalisation of aliens who possess certain qualifications. Both registration and naturalisation are dependent upon a declaration of willingness to renounce any other nationality or citizenship. Citizens of Ghana may be deprived of that citizenship if they voluntarily acquire the nationality of a foreign country or fail to renounce any other nationality or citizenship when required to do so by the Ghana Government; and citizens by registration or naturalisation may lose their citizenship on grounds of fraudulent applications, disloyalty, convictions abroad or continued residence abroad (Commonwealth Survey, C.O.I., May 28, 1957).

Public officers. An agreement has been published between the Governments of the United Kingdom and of Ghana under which an officer who continues to serve in Ghana does so under conditions " not less favourable " than those enjoyed before Ghana became a self-governing member of the Commonwealth. Other paragraphs relate to entitled officers' right to retire, preservation of pensions, payment of pensions and members of the Overseas Civil Service and Judiciary (Cmnd. 158).

Kenya

Racial policy. See **Rhodesia and Nyasaland** (below, p. 282).

Malaya

Constitution. Talks between representatives of the United Kingdom Government and of the Malay Rulers and the Government of the Federation of Malaya were held in London from May 13 to 21, 1957, under the chairmanship of the United Kingdom Secretary of State for the Colonies. Their purpose was to reach agreement upon the future constitution of the Federation of Malaya and to clear up a number of points for the benefit of the draftsmen preparing the new constitutional instruments. The talks were based upon the recommendations of the Constitutional Commission under the chairmanship of Lord Reid and upon the subsequent discussions of the recommendations of this Commission, in the Federation of Malaya, between representatives of the Malay Rulers and the Government of the Federation. They ended in agreement on all outstanding issues.

The agreements reached provide for the new constitution of an independent Federation of Malaya to come into force on August 31, 1957. They will now be laid before Her Majesty the Queen and the Conference of Rulers in the Federation of Malaya for their approval. It is intended, thereafter, that a White Paper should be published, both in the United Kingdom and in the Federation of Malaya, giving the details of the agreements reached in regard to the new constitution.

The Secretary of State gave an interview on May 21 to delegations representing the Pan-Malayan Federation of Chinese Associations and the Malayan Party of Malacca. He reminded the delegations that all persons and parties in the Federation had had the opportunity of making their views known to the Constitutional Commission and that the time had now arrived for agreement to be reached on the new constitution. He assured the delegations that the views they had expressed had been amongst those taken into account in the constitutional discussions, and that he was confident that the final constitution would represent a fair compromise between the differing opinions of the various sectional interests and racial groups in the Federation. He asked the delegations, in the interests of Malaya as a whole, to accept loyally the constitution as it finally emerged, even though it might not at all points accord with their own wishes, and to work for the unity of the new Malaya.

It has been announced that Mr. G. W. Tory, at present United Kingdom Deputy Commissioner in Australia, will be the first High Commissioner for the United Kingdom in the Federation of Malaya, when it attains independence (Commonwealth Survey, C.O.I., May 28, 1957).

Malta

Constitution. The Secretary of State for the Colonies said on May 8, 1957, that the Governments of the United Kingdom and of Malta had so far been unable to reach agreement on the principles governing the economic arrangements under the integration proposals (569 H.C. Deb. 967–970).

Rhodesia and Nyasaland

Constitution. The following joint announcement by the Governments of the United Kingdom and of the Federation of Rhodesia and Nyasaland was issued simultaneously in London and Salisbury, the Federal capital, on April 27:

1. Discussions were held in London from April 12 to April 17, 1957, between Sir Roy Welensky, Prime Minister, and Mr. J. M. Greenfield, Minister of Law, of the Federation of Rhodesia and Nyasaland, and Lord Home, Secretary of State for Commonwealth Relations, and Mr. Lennox-Boyd, Secretary of State for the Colonies, about certain aspects of the constitution of the Federation.

2. They reviewed the progress made by the Federation since it was established in 1953. They agreed that this progress had justified the hopes of its founders and provided a sound basis for further development of the policy of partnership betwen races which the Federation is pursuing.

3. The Federal constitution provides that matters of external affairs may, from time to time, be entrusted to the Federation. The Federal Prime Minister represented that the time had come for the Federation to assume more responsibility in this sphere, particularly in the field of relations with other countries, and the appointment of representatives of the Federation in such countries. The United Kingdom Government have agreed to entrust responsibility for external affairs to the Federal Government to the fullest extent possible, consistent with the responsibility which Her Majesty's Government must continue to have in international law so long as the Federation is not a separate international entity.

4. In recognition of the constitutional position of the Federation, H.M. the Queen has been pleased to approve that, in future, the Prime Minister of the Federation should have direct access to the Sovereign on Federal matters affecting the Sovereign personally, on the award of honours for services to the Federation, and on a number of ceremonial matters.

5. There was discussion of a proposal by the Federal Prime Minister that a separate department of the United Kingdom Government, responsible to the Secretaries of State for Commonwealth Relations and the Colonies jointly, should handle relations both with the Federal Government and with all three Territorial Governments. United Kingdom Ministers explained that this was part of the general question of the responsibility of different Ministers for relations with the various parts of the constantly evolving Commonwealth. The whole question would have to be examined and in this examination Sir Roy Welensky's suggestion would be borne in mind.

6. The Federal Government having represented that the Federal Legislature should have the power to legislate with extra-territorial effect, the United Kingdom Government have agreed that legislation for this purpose will be introduced into Parliament at Westminster at a convenient opportunity.

7. The Federal Prime Minister drew attention to doubts which had arisen in regard to the purpose and effect of Article 29 (7) of the Federal constitution [This Article provides: " Nothing in this Constitution shall affect any power to make laws for the Federation or any of the Territories conferred on Her Majesty by any Act of the Parliament of the United Kingdom "], and to the subject of legislation in the United Kingdom for the Federation. United Kingdom Ministers made it clear that the United Kingdom Government recognise the existence of a convention applicable to the present stage of the constitutional evolution of the Federation, whereby the United Kingdom Government, in practice, does not initiate any legislation to amend, or to repeal, any Federal Act, or to deal with any matter included within the competence of the Federal Legislature, except at the request of the Federal Government.

8. Public service questions were also considered. The United Kingdom Ministers said that, in principle, it was accepted that all civil services in the Federation, whether Federal or Territorial, would eventually be locally based and look for their future to the Federal area. Accordingly, steps would be taken to work towards this objective, and, in particular, the question of interchangeability of officers would be examined in consultation with the four Governments of the Federation.

9. The Federal Prime Minister informed United Kingdom Ministers of the position reached in his discussions with the Prime Minister of Southern Rhodesia and the Governors of Northern Rhodesia and Nyasaland in regard to the enlargement of the Federal Assembly and to the Federal franchise. United Kingdom Ministers accepted, in principle, proposals for the enlargement of the Federal Assembly. The Federal Prime Minister stated that he

would not be able to inform Her Majesty's Government of the Federal Government's definite proposals for the franchise, or to present a Bill on this subject to the Federal Legislature, until further discussions had been held in Salisbury. Meanwhile, however, he could assure United Kingdom Ministers that a Franchise Bill would be introduced, and would ensure that British protected persons otherwise qualified would not be required to change their status in order to be eligible for the Federal franchise, and that the qualifications for that franchise would permit of a reasonable number of such persons acquiring the franchise. United Kingdom Ministers took note with satisfaction of these assurances.

10. The Federal constitution provides for a review not less than seven, nor more than nine, years from the date when it came into force (October 1953). In this connection, the two Governments have agreed on the following *Declaration*: annexed.

1. Her Majesty's Government in the United Kingdom, and the Government of the Federation of Rhodesia and Nyasaland, have already made it clear and take this opportunity of reaffirming, that they are opposed to any proposal, either for the amalgamation into a unitary State of the territories now composing the Federation, or for the secession of any of those territories from the Federation.

2. Article 99 of the Federal constitution provides that not less than seven, nor more than nine, years from the date of the coming into force of the constitution, there shall be convened a conference consisting of delegations from the Federation, from each of the three territories and from the United Kingdom, chosen by their respective Governments for the purpose of reviewing that constitution. The constitution came into force in 1953, and it is agreed that the conference shall be convened in 1960.

3. The purpose of this conference is to review the constitution in the light of the experience gained since the inception of federation, and, in addition, to agree on the constitutional advances which may be made. In this latter context, the conference will consider a programme for the attainment of such a status as would enable the Federation to become eligible for full membership of the Commonwealth (569 H.C. Deb. 353–359, May 2, 1957).

Fiscal review. The Fiscal Review Commission, 1957, has submitted its report to the Governor-General. It was appointed to consider " whether the proportions set out in Articles 80, 83 and 90 of the constitution for the distribution between the Federation and the three territories of the proceeds of taxes on income or profits, the proceeds of export duties and the amounts to be raised by borrowing outside the Federation respectively, are satisfactory " (see Commonwealth Survey, C.O.I., May 14, 1957).

Judicial committee. Subsection (1) of section one of the Judicial Committee Amendment Act, 1895, provides that, if any person being or having been Chief Justice or a judge of the Supreme Court or of a Superior Court of certain of Her Majesty's dominions specified in the said Act, or of any other Superior Court of Her Majesty's dominions named in that behalf by Her Majesty in Council, is a member of Her Majesty's Privy Council, he shall be a member of the Judicial Committee of the Privy Council. An Order in Council has been made naming the Supreme Court of the Federation of Rhodesia and Nyasaland as one of the Superior Courts in Her Majesty's dominions for the purposes of the said Act (S.I. 1957 No. 857).

Racial policy. On June 4, 1957, the House of Commons debated the question of racial policy in the Central African Federation, Kenya and Tanganyika (571 H.C. Deb. 1091–1217).

Singapore

Constitutional conference. 1. The report of the Singapore Constitutional Conference, which opened on March 11, was formally signed on April 11.

The task of the conference was to agree upon provisions to be embodied in a new constitution for Singapore, and, at the outset of the conference, it was agreed in principle that the constitution should be designed to confer upon Singapore full internal self-government, leaving responsibility for external affairs and defence, and the ultimate right to suspend the constitution, still in the hands of the United Kingdom Government. It was also agreed that Singapore should, in future, be known as the State of Singapore and that provision should be made in the constitution for a wholly elected legislature, a Malayan-born Head of State, an Internal Security Council on which the Governments of the United Kingdom, Singapore and the Federation of Malaya should be represented, a separate Singapore citizenship, the independence of the judiciary, and safeguards for the rights of Malays and other minorities. The following is a summary of the principal arrangements which were agreed at the conference.

2. The present Legislative Assembly, which consists of three *ex officio,* four nominated and twenty-five elected members, should be replaced by a wholly elected Assembly of fifty-one members, and provision should be made for the election or appointment of a Speaker. No provision should be made for Her Majesty's power of disallowance of Singapore Bills, save in respect of Trustee Stock matters. In accordance with the Colonial Stock Acts of 1877 and 1900, retention of such a power is required to enable Trustees to invest in Singapore Government Loans on the London Market. The Council of Ministers at present consists of three *ex officio* Ministers (the Chief Secretary, the Attorney-General and the Financial Secretary) and six unofficial Ministers (elected members drawn from the legislature), presided over by the Governor. It is proposed that there should be no *ex officio* members in the new Council, that the title of Chief Minister should be changed to that of Prime Minister and that the latter should preside at meetings of the Council.

3. The Singapore delegation proposed that the office of Governor should be abolished, and that a Malayan-born personage should be appointed to act as the Queen's representative in Singapore and that a separate post of representative of the United Kingdom Government should be created. The United Kingdom Government accepted this proposal in principle and it was agreed that the Queen's representative should be given the Malay title of Yang di-Pertuan Negara (Head of State), and that he should be appointed by the Queen on the advice of the United Kingdom Government after consultation with the Singapore Government. The Head of State would, in general, act in accordance with the advice of his Ministers, save that he would exercise the degree of personal discretion ordinarily reposed in the Queen's representative in a fully independent member of the Commonwealth. The representative of the United Kingdom Government, to be known as the United Kingdom Commissioner, should have functions and powers necessary to the discharge of the responsibilities of the United Kingdom Government in Singapore. In order to provide a transitional period in which the new arrangements could be effectively established, it was agreed that, for six months after the date of coming into force of the new constitution, the posts of Head of State and United Kingdom Commissioner should be combined and held by one person, who need not, during this period, be Malayan born.

4. It was agreed that the United Kingdom Government should continue to be responsible for the external defence of Singapore and to have the full right to the occupation, control and use of the bases and installations in Singapore. The United Kingdom Government should also continue to be responsible for the external relations of Singapore, save that authority to conduct matters concerning trade and cultural relations with other countries should be delegated to the Singapore Government, subject to safeguards in respect of the United Kingdom's internal responsibilities. All other matters should be the responsibility of the Singapore Government, and the power of the United Kingdom to legislate generally by Order in Council should cease.

The United Kingdom Government should, however, retain the power to suspend, and thereafter to amend, the constitution by Order in Council.

5. It was agreed that the new relationship between the Governments of Singapore and the United Kingdom would require continuing consultation between the two Governments, as it was clear that their spheres would overlap at certain points. Special attention was therefore given to those matters on the borderline of each Government's responsibilities, and to the consultative arrangements required both to ensure the Government of Singapore's freedom of action within its own sphere, and to safeguard the United Kingdom Government's responsibilities. It was therefore agreed that an Internal Security Council should be established to provide for consultation on matters concerning the maintenance of law and order and internal security. The council should consist of the United Kingdom Commissioner as chairman and two other United Kingdom members, the Prime Minister and two other Ministers of the Singapore Government, and (subject to the formal agreement of the Government of the Federation of Malaya, terminable upon six months' notice) one Minister from the Federation of Malaya, to be nominated by that Government. The Council should have the power to take binding decisions by a vote of all its members. Agreement was also reached on the establishment by administrative action of an inter-government committee, under the chairmanship of the United Kingdom Commissioner, in which representatives of the Singapore and United Kingdom Governments will discuss matters affecting the Singapore Government arising from the United Kingdom's responsibility for external affairs and defence.

6. At the final plenary session of the conference, the United Kingdom Government made it clear that their agreement to the internal security arrangements in particular, and to the new constitution as a whole, was dependent upon provision being made to ensure that persons known to have been engaged in subversive activity should not be eligible for election to the first Legislative Assembly of the new State of Singapore. The Singapore delegation expressed their disagreement with this departure from normal democratic practice and protested at the unilateral imposition of this condition. For the United Kingdom Government it was stated that this was a condition, precedent to the new constitution, which they would have to impose. It was the view of the United Kingdom Government that some temporary restriction of this kind was essential to safeguard the orderly development of democratic government in Singapore against the danger of Communist subversion. Future policy in this respect would be a matter for the Singapore Legislature to decide after the first elections. In the circumstances, the Singapore delegation took note, with regret, of the intention of the United Kingdom Government.

7. At the beginning of this year a Public Service Commission was established in Singapore with executive power, and a Malayanisation scheme has been introduced with the approval of the United Kingdom Government. In view of the importance of maintaining the public service at a high level of morale and efficiency, it was agreed that the arrangements already made for an independent public service commission, and for safeguarding the existing rights of expatriate officers, should be embodied in the constitution. It was agreed that the three senior police appointments should be manifestly free from political influence, and should, therefore, remain within the sphere of the Public Service Commission, being appointed by the Queen's representative on the recommendation of the Commission. The independence of the judiciary should be fully safeguarded, and provisions for the appointment, promotion and removal from office of judges should be written into the constitution.

8. As agreed at the 1956 conference a separate Singapore citizenship within the Commonwealth should be created. The necessary legislation would be enacted in Singapore, and the United Kingdom Government have agreed that

the British Nationality Act should be amended so that Singapore citizenship would be recognised in United Kingdom law as conferring the status of Commonwealth citizen. Agreement was reached on the provisions of the proposed Singapore citizenship which take due account of the special position of Commonwealth citizens. It was the view of the Singapore delegation that elections under the extended franchise which would result from these citizenship proposals must precede the coming into force of the new constitution. It was, therefore, agreed that it should be brought into force on a date after January 1, 1958, and when the Governor is satisfied that sufficient time has been allowed to enable those entitled to the new citizenship to acquire it and to be placed on the electoral roll.

9. The position of civilian employees of the Armed Forces was discussed separately from the conference and agreement was reached.

The report of the Conference is contained in Cmnd. 147. The above summary is based on Commonwealth Survey, C.O.I., April 30, 1957.

Report. The Colonial Report, 1955, has been published by the Colonial Office.

Somaliland

Report. The Colonial Report, 1954 and 1955, for the Protectorate, has been published by the Colonial Office.

Tanganyika

Elections. The Tanganyika Legislative Council has passed a Bill to provide for the first elections. In four or five constituencies, elections will be held in September 1958 and in the remainder in 1959. The Bill provides for a qualitative franchise and the election from each constituency, on a common roll, of three members, one each from the three main races in the territory. There will, as at present, be ten Africans, ten Asians and ten Europeans on the unofficial side of the Legislative Council (Commonwealth Survey, C.O.I., June 11, 1957).

Ministerial system. The Governor of Tanganyika, in his speech at the opening of the Budget Session of the Legislative Council on April 30, 1957, announced that, subject to the approval of the Council, a Ministerial system was to be introduced in the territory with effect from July 1 if possible and certainly not later than October 1, 1957. The present Members are to be redesignated Ministers as an indication that they will now concentrate on the making of policy and at the same time six unofficial Assistant Ministers will be appointed to relieve the new Ministers of many executive and administrative responsibilities. The new Assistant Ministers will speak for the departments assigned to them in Legislative Council and, where matters affecting these departments come before Executive Council, will attend meetings of Executive Council and take part in discussions. The Governor will shortly be offering these appointments to certain individuals and the names of those who accept, together with the subjects assigned to them, will then be announced. The composition of the Executive Council will for the present remain unchanged.

It was also announced that following the first elections to Legislative Council, which are to be held in certain constituencies early in 1958, the Governor proposed to appoint a committee of the members of the new legislature to study further constitutional development in the territory. The committee's precise terms of reference are not yet defined but they are likely to include such questions as: (i) in which additional constituencies should elections be held at the next election and whether the existing constituencies require revision; (ii) along what lines the new Ministerial system should be developed, including consideration of the functions and composition of the Executive Council.

Racial policy. See **Rhodesia and Nyasaland** (above, p. 282).

Uganda

Public Service Commission. An Order in Council has been made providing for the establishment of this Commission. The Order provides that the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers is vested in the Governor acting in his discretion. The Governor is to appoint the Commission and may refer to it for its advice any question relating to these matters, with certain exceptions, but he is not required to act in accordance with this advice (S.I. 1957 No. 862).

Report. The Colonial Report, 1956, has been published by the Colonial Office.

West Indies

Governor-General. The Secretary of State for the Colonies announced the appointment of Lord Hailes (formerly Mr. Patrick Buchan-Hepburn). For criticism of this appointment, see 570 H.C. Deb. 575–577, May 16, 1957, and 203 H.L. Deb. 1054–1067, May 21, 1957.

Zanzibar

Debate. On May 2, 1957, the House of Commons debated Zanzibar on the adjournment.

BOOK REVIEWS

THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT. By ROBERT H. JACKSON. [Harvard University Press. London: Geoffrey Cumberlege. 1956. 92 pp. 16s.]

MASSACHUSETTS STATE GOVERNMENT. [Harvard University Press. London: Geoffrey Cumberlege. 1956. 399 pp. 48s.]

MR. JUSTICE JACKSON of the United States Supreme Court was invited by Harvard to deliver the Godkin Lectures for 1955; he died suddenly in October, 1954, and the lectures here reviewed are substantially as he would have delivered them, for he left complete drafts of all three lectures and these have now been published with the assistance of his law clerk, Mr. E. Barrett Prettyman Jr., and his son, Mr. William Eldred Jackson. The lectures deal with the Supreme Court as a Unit of Government, as a Law Court, and as a Political Institution.

As a writer of opinions Mr. Justice Jackson was the most attractive of all the members of the Roosevelt Court. As a writer he was a considerable stylist, but his style emerged not so much from a love of words as from the natural vigour and clarity of his views. He struck with great force while the metal was still hot and invariably succeeded in reaching a clear decision. A continuous sense of urgency, an impatience with those who interest themselves in the easy peripheral aspects of a matter in the hope that the tough core will eventually disappear and leave them at peace: a need to speak out in spite of the difficulties known to arise from too forthright opinions from the highest court of the land; these, added to an unusual knowledge and always relevant use of the classics of the English language made a Jackson opinion the one to be studied by those in search of the phrase that might become historic. As a lawyer Jackson never forgot that the Supreme Court is in business largely because politicians, administrators and citizens have run the ship on the rocks and are now asking the court to refloat it. By the rules of constitutional salvage one is not at liberty to abandon the ship or dynamite the rock of the Constitution; according to one's attitude, it is more in order to chip away a bit of rock or to lighten the vessel by throwing some baggage overboard or even some passengers if these can be provided with lifebelts. On the Supreme Court Jackson had the added attraction of being less predictable than some of his colleagues. Generally more a conservative than a radical he was yet quite likely to damn in most unconservative language the whole conduct of the expedition it was now his duty to save. He never wavered in his duty, but he never pretended that he found the work congenial if he did not.

In these lectures (which were to be delivered to the Harvard Graduate School of Public Administration) Mr. Justice Jackson set out to instruct rather than criticise, but in his lecture on the Supreme Court as a law court he raises some important doubts about the adequacy of the rules and practices now governing the court's treatment of diversity of citizenship cases, and those involving the Full Faith and Credit Clause of the Constitution. "The Court has held" he writes at p. 43, "that where the question is which law of two or more states is applicable, the rule as to conflict of laws of the state in which the suit is brought is conclusive, and the conflict does not present a federal question. I find this doctrine difficult to reconcile with the purposes of the Full Faith and Credit Clause, which requires credit for public acts as well as judicial judgments. The forum of a suit may be determined fortuitously by where a defendant can be found for service, or it may be chosen purposely for some advantage, found in its law. To allow choice of law to be made in effect by one of the parties or by fortuitous circumstances is not consistent with a rational system of justice." Congress may, under the Constitution, "prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof" but it as not yet thought fit to act upon this constitutional permission. One result from this is that the Supreme Court still finds itself with a great amount of business to do which is concerned with jurisdictional questions, and questions in private law. Mr. Justice Jackson points out quite frankly that Supreme Court Justices, because of the manner in which they are appointed and the nature of their duties as constitutional guides, are often not as well equipped with legal learning as are the justices of some state Supreme Courts for the determination of intricate matters of private law.

Discussing the court as a political institution, Jackson takes his stand as an upholder of "judicial self-restraint"; but characteristically, he does not allow this restraint to interfere with his clear expression of the view that while the court should not attempt to usurp the legislative functions of another arm of government, a Supreme Court Justice can have views about the quality of the legislative arm. A crucial contemporary issue is civil liberties: "any court (p. 82) which undertakes by its legal processes to enforce civil liberties needs the support of an enlightened and vigorous public opinion which will be intelligent and discriminating as to what cases really are civil liberties cases and what questions really are involved in those cases. I do not think the American public is enlightened on this subject."

Massachusetts State Government is a Citizens Handbook produced by the Massachusetts League of Women Voters, and contains all that an intelligent citizen of that state, male or female, could possibly want to know about the history and administration of the state. It is a well-planned book and will probably be of more use to a British student of American state government than any that have been available on this side heretofore. It is to be regretted that the number of steady students of American state government in this country is such that it is not likely to break any publishing records over here; while it is a matter for reflection that in the U.S. a citizens group can produce such an admirable and useful book devoted entirely to local government and politics.

R. H. PEAR.

LAW AND ORDERS. Second Edition. By SIR CARLETON KEMP ALLEN, M.C., Q.C., D.C.L., F.B.A., J.P. [London: Stevens & Sons, Ltd. 1956. xxv and 482 pp. 42s.]

THAT the first edition of *Law and Orders* would appear on the eve of the General Election of 1945 was unforeseen by its author and was, indeed, an embarrassment to him. However, the date of its publication made certain what was in any event probable—that it would become the most controversial of modern books on English administrative law. The author may have winced at the style of the ecstatic reviewer who hailed it as a Bible for all who oppose controls and a tough nut for the others to crack; but the reviewer's sentiments were shared by many enthusiasts. "The others" were apt to dismiss it as an eccentric diatribe issuing from the home of lost causes. Those were the days (which may yet return) when political images stood out starkly; the contending factions were progressives and reactionaries, or revolutionaries and traditionalists.

> "Fire answers fire, and through their paly flames
> Each battle sees the other's umber'd face. . . ."

In this context the strongly individualistic bias of Dr. Allen's approach to public law problems set up a psychological resistance in those who disagreed with some of his fundamental assumptions. *Law and Orders* would be recommended for further reading, but only after the student had been given an appropriate caution.

The second edition looks like an entirely new book. It is a larger book although the section on administrative tribunals has been removed, rewritten, and published separately. Chapters have been re-arranged and the appendices substantially altered. And although the individualistic bias is apparent, the book is far from being a sustained polemic. Yet when the reader comes across a passage particularly conspicuous for its studied moderation and turns back to the first edition to see how far the author's formulation has changed, he is as likely as not to discover that there has been no change at all. Perhaps, then, the characteristics that one had associated with the first edition never existed. But this would be carrying self-criticism too far; for there are important omissions and changes of emphasis in the new edition that make it a more realistic, balanced and judicious work than the old. The bureaucrat is still baited with dexterous thrusts, but the pejorative reference to the Departmental understrapper has gone. The catalogue of absurdities selected from the jumble of delegated legislation is shorter but more representative. The blunders made by a hard-pressed wartime administration at the expense of individual citizens are discussed with a better sense of proportion. A good deal is made of the Crichel Down affair, but its importance is not unduly magnified. Sir Carleton rightly devotes more space to the peculiarly unpleasant case of *Odlum* v. *Stratton.* By printing in full the unreported judgment in an appendix he has performed a valuable service.

A number of changes have been made necessary by the reforms introduced since 1945. The chapter on Crown proceedings has had to be recast, and Sir Carleton concentrates his fire on Crown privilege in relation to the disclosure of documents. Few administrative lawyers will dissent from his criticisms of the present state of the law and administrative practice on this matter. The safeguards against the abuse of delegated legislative powers have been strengthened by the work of the Select Committee on Statutory Instruments under the Act of 1946. But these improvements are hardly sufficient to account for the discarding of several of the proposals made in the first edition. Sir Carleton's faith in the efficacy of increased parliamentary control over delegated legislation may well have been shaken by the experience of government by stretcher in 1951, when the Opposition almost contrived to lay a Government low by praying long into the night for the annulment of statutory instruments. He now looks sympathetically upon a proposal by Mr. Aneurin Bevan for a Standing Committee to examine draft Orders; and he makes the useful suggestion that there should be a scrutinising committee for departmental circulars and notes for guidance. For the rest, he looks forward, without optimism, to the possibility of reforms in parliamentary procedure that would leave more time for discussion.

The consideration of judicial review might have diverted the easy flow of the narrative, but Sir Carleton's scholarly treatment of the subject is so fluent that no problem of presentation seems to have existed. On a few matters his views are open to challenge. His proposition (pp. 165–166) that a requirement that a statutory instrument be " laid " before Parliament is directory and not mandatory is a tenable one, but such a requirement is of considerable constitutional importance and raises a presumption that it should be regarded as mandatory. This presumption is not rebutted by the equivocal wording of section 5 of the Statutory Instruments Act, or by other statutory provisions, to the effect that the annulment of, or failure to approve, an instrument shall not affect the validity of acts already done in pursuance of it. His assumption that an injunction cannot in general be obtained in a case where prohibition would lie (p. 265) is too readily made; but the development of an argument in support of the contrary view would carry us beyond the limitations of a book review. It should have been explained that certiorari and prohibition cannot be used to impugn purely legislative acts. (And why does the bulk of the material on judicial review appear under the rubric "The Courts and Delegated Legislation"? Most of the matters dealt with concern administrative and judicial acts.) In considering the scope of the action for a declaration, more space might well have been devoted to the implications of R.S.C., Ord. 54A, r. 1A. The decision of the House of Lords in the *Stevenage* case is severely criticised; it is certainly arguable that Lord Thankerton's characterisation of the Minister's duties was ill-phrased, but is it to be seriously contended that the Minister should have been required to display a judicial impartiality in making his final decision? Sir Carleton does not make clear his own views on this point. Having regard to the administrative history and general scheme of the new towns project, it would have been utterly unreasonable for the courts to require the Minister to cast himself in the role of a detached umpire. If a critic's real objection is to the policy behind legislation, or to the administrative machinery by which that policy is implemented, it is desirable that he should say so.

Sir Carleton takes a gloomy view of the prospects of judicial review. To him, the attitude of the House of Lords towards administrative law questions has been more executive-minded than that of the Executive. Departing from the opinions expressed in the first edition, he now leans towards the idea of an Administrative Division of the High Court as advocated by the Inns of Court Conservative and Unionist Society.

Law and Orders will survive as a standard work on problems of delegated legislation and as an immensely stimulating essay on the wider aspects of administrative law. One may confidently predict that the second edition will earn a higher place in legal literature than the first; but each will stand as a fitting memorial to its author as an erudite scholar, a trenchant but courteous critic and a master of the craft of good writing.

S. A. DE SMITH.

ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM. By W. FRIEDMANN AND OTHERS. [London: Stevens & Sons, Ltd. 1956. vi and 635 pp. with Appendices and Index. £4.]

THIS work is the third volume in the comparative law series edited by Professor Friedmann and produced under the auspices of the Law Faculty of the University of Toronto. Few will disagree with Professor Friedmann when he remarks in his Preface that the subject of restrictive trade practices is urgently in need of a comparative survey and critical analysis; and it is this need which he and his collaborators have sought to meet.

The book is divided into three parts. The first, entitled "National Laws" is a survey of the manner in which ten countries have dealt with problems arising in connection with the control of restrictive practices. The treatment is both quantitatively and qualitatively uneven. Canada, France, Germany, the United Kingdom, and the United States are dealt with at length, while Japan, the Netherlands, Norway and Sweden are treated in a relatively summary fashion. South Africa is covered merely by the reproduction of the Regulation of Monopolistic Conditions Act, 1955. The section on the United Kingdom contributed by Mr. Grunfeld and Mr. Yamey, although to some extent overtaken by the Registration of Restrictive Trade Practices Act, 1956 (the text in Bill form appears as an appendix and is the subject of a short postscript by Mr. Yamey), must rank as an outstanding account both of the English common law approach to restrictive trade practices and of the work of the Monopolies Commission under the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. The section on the United States (contributed by Mr. Timberg) is again of a high standard and can be read with profit and advantage by anyone who (like the present reviewer) finds the United States anti-trust scene "a succession of paradoxes." The other sections are undistinguished and are principally notable for a dearth of references to source material and further information.

The second part comprises a discussion by Professor Friedmann and Hr. van Themaat on "International Cartels and Combines." The writers take a pessimistic view of the possibilities of securing control of such organisations within the foreseeable future. The rule of public international law whereunder a State in general terms lacks competence to regulate the conduct of non-nationals abroad, and the diverse national attitudes to the practices involved are conceived as formidable obstacles to success within the existing legal order. The most likely mode of regulation is seen in the establishment of supra-national public authorities in the style of the European Coal and Steel Community.

The third part (contributed by the editor alone) is entitled "Comparative Analysis," and in a subject where personal prejudice is prone to intrude this part is remarkable for its objectivity. However, it appears that Professor Friedmann would approve of the technique adopted in the United Kingdom's Registration of Restrictive Trade Practices Act, 1956.

The Preface describes this as being "essentially a lawyer's book." However, it is hard to imagine a practitioner turning to its pages; while the academic will (with the two notable exceptions already referred to) find the discussion far too general and unsupported by references to provide him with a longed-for source book in this field. A more accurate description (which receives some support from a passage on p. 554) might be that it is essentially a book for legislators, since he who desires to find a solution for the problems discussed will find the general exposition by those experienced in their own State's mode of procedure to be invaluable.

The book is attractively produced, but there are a number of printer's errors of which the most remarkable is in note 20 on p. 479 where the name of one of the contributors appears in barely recognisable form.

MICHAEL MANN.

BOOKS RECEIVED

Constitutional Laws of the Commonwealth. Volume I: *The Monarchies.* By Sir Ivor Jennings. Clarendon Press: Oxford University Press. 1957. xxiv and 400 pp. and (appendix and index) 96 pp. (50s. net.)

Cases on the Constitution of the Commonwealth of Australia. Second Edition. Selected and annotated by Geoffrey Sawer, B.A., LL.M., of the Victorian Bar, Professor of Law in the University of Melbourne. Australia: Law Book Co. of Australasia Pty., Ltd. 1957. xxxi and 612 pp. (appendix and index) 629 pp. (70s. net.)

Theory and Reality in Public International Law. By Charles de Visscher, Professor at the University of Louvain. Princeton: Princeton University Press; London: Oxford University Press. 1957. xiv and 365 pp. (index) 14 pp. (30s. net in U.K.)

The British Statute Book. By Christopher Hughes, M.A., B.PHIL. London: Hutchinson University Library. 1957. 142 pp. and (appendices and index) 25 pp. (10s. 6d. net.)

Nationality and Citizenship laws of the Commonwealth and the Republic of Ireland. By Clive Parry, M.A., LL.B. London: Stevens & Sons, Ltd. 1957. liv and 996 pp. and (index) 24 pp. (£6 6s. net.)

The Organisation of British Central Government, 1914–1956. A Survey by a Study Group of the Royal Institute of Public Administration. By F. M. G. Willson. London: Allen and Unwin. 1957. (32s. net.)

Constitutional Problems in Pakistan. By Sir Ivor Jennings. Cambridge University Press. 1957. (42s. net.)

PUBLIC LAW

Winter, 1957

COMMENT

THE new Parliamentary session is expected to see the passing of a Local Government Bill more important than that of 1933. The preliminaries have been performed. The Government have been successfully delivered of three White Papers over a period of twelve months, and the future of these offspring has been debated during two days in the House of Commons. The local authority associations and other affected bodies, on whose recommendations the Papers were partly based, have reacted like midwives who do not altogether like the issue of the labours they have assisted; and have found the triplets to be one black, one white and one khaki. The Government have indicated that the proposals are to be slightly altered. And all now eagerly await the form and precise content of the Bill and the possibility of further alterations.

Local government reform seems always to arouse the deepest feelings of the important few. Local councillors are easily outraged by novel proposals. They are outraged partly because local government is a happy hunting ground for amateur and trigger-happy marksmen; partly because, on principle, they suspect every move made by the central government or by councillors belonging to other types of authorities and partly because they are naturally of a conservative turn of mind. But overshadowing these reasons for their touchiness, their jealousy and their suspicion is the large bulk of a British peculiarity. For to most councillors, local government is a hobby. It is because of this that the idea of being paid horrifies them so that they often prefer not to claim even expenses, unless these are considerable; it is because of this that they are zealots; and it is because of this that they form themselves into protective associations. The Association of Municipal Corporations, the County Councils Association (and those of the minor authorities) are vigorous and influential bodies. Like trade unions and federations of employers, they exist primarily to promote the interest of their member councils, and when the interests of counties and boroughs conflict they are apt to adopt extreme positions the better to bargain from. Irritation is sometimes expressed at the apparent failure of these associations to take a wider view, but this is to mistake their function. The adversary method of argument is useful for the isolation of the real issues and provides the necessary background and information for the making of Governmental decisions. It is true that the rivalry between local government associations has in the past enabled Governments to shelve the problems; but latterly, under some central pressure, a considerable measure of agreement has been reached.

The White Paper on areas and status of local authorities in England and Wales was discussed in these pages last year by the Clerk of the London County Council who then deplored the overemphasis which continues to be placed on the conflict over county borough status. This conflict, in which the major associations are joined, has indeed very little relevance to the principal problems of local government as a whole. It is a fraternal dispute which, however it is decided and whether it is decided or not, does not affect the relationship between central and local government. The two Commissions which are to be set up will be concerned primarily to resolve these internal arguments. And their solutions will not, therefore, be of general importance, being directed away from the vital question of area in relation to function. Perhaps the conurbations will be more deeply affected by the recommendations of the Commission for England than will the rest of the country. The proposals in the White Paper have now been amended by the promise to set up a Royal Commission on Greater London. The Minister of Housing and Local Government said in the House of Commons on July 29, 1957, that its task would be " to examine the present structure and working of local government " in the area and " to make recommendations about the broad structure appropriate to the area in present conditions and about the distribution of the main local government functions, with special reference to the possible need for an overall authority for any services throughout the whole area." Are these terms of reference wider, in their reference to functions, than those intended for the Commission which will deal, as part of its task, with South-East Lancashire, the West Midlands, West Yorkshire, Merseyside and Tyneside? The Minister, in making a difference between the former Local Government Boundary Commission and the new Commissions, said: " the Government are intending to deal this time with both structure and functions " and that the new Commission would not be in the position of being asked to deal with " form divorced from purpose." But the second White Paper—on the functions of county councils and county district councils in England and Wales—contains positive proposals for the redistribution of functions within the county areas. It is, therefore, difficult to see what powers are left to the new Commissions to effect a reconciliation between " form " and " purpose " before the decree is made absolute. Again modifications have been made in the proposals of this second Paper. " On some of the functions in question," the Minister has said (he instanced weights and measures), " the Government are now disposed to suggest that responsibility should be directly conferred upon district councils with populations of 60,000 and over, instead of being delegated " and on two of the other functions—classified roads and food and drugs—" we shall probably not proceed with the proposals contained in the White Paper, and will be suggesting that the present arrangements might be left as they are " with a minor exception.

Mr. Self has already discussed in these pages the third—and most important—White Paper, that on finance. The proposal to replace percentage grants by a new general grant becomes (because housing and highways are excepted) almost a proposal to stop the specific grant for education. Mr. Self wrote: " Given the limitations of the rating system and the present negative attitude of ratepayers, a shift in financial responsibility from Government to local authorities seems likely to be more productive of a sluggish performance of duties than of fruitful innovations." In fields such as education, where increasing expenditure is inevitable because of the high birthrate, consequential because of the growing proportion of children remaining at school for sixth form work, and desirable because of the national need for skills and techniques of all kinds, the danger is not merely that innovations may not fructify but that standards may actually fall. This will not be because of the meanness of the chairmen of education committees for, in local government as elsewhere, those in charge are anxious to see their projects flourish. But the burden of " the rates " must now loom larger when percentages of " approved expenditure " are not to be received from the Ministry. The householder finds the payment of rates more painful than the payment of taxes on income, for P.A.Y.E. is an efficient analgesic. Yet if education must cost more, the ratepayer and his money must be increasingly parted. The Government proposals may transfer more " freedom " to local authorities but the price of this freedom is the transference also of the job of collecting the money.

Many criticisms are likely to be made of the new Bill when it is published. The proposals may yet be much modified in committee. But it would be churlish not to notice that the Government is seriously tackling the problem—which is more than any other Government has done since the war.

THE provisions of the Acts passed between 1945 and 1950 for the nationalisation of coal, gas, electricity, transport and civil aviation had much in common. The draftsmanship was of a piece. Now the Electricity Act, 1957, has introduced some small, but perhaps significant, changes in the common form wording which are worth noting.

The much debated sections which gave the Ministers power to give directions to the earlier corporations provided (taking the Electricity Act, 1947, as the example): " The Minister may, after consultation with the Central Authority, give to that Authority such directions of a general character as to the exercise and performance by the Authority of their functions under this Act as appear to the Minister to be requisite in the national interest, and the Authority shall give effect to any such directions." The Act of 1957 omits the words " exercise and " and does not state that the corporations shall give effect to directions. The non-lawyer may feel that even to mention these changes is to quibble; but if the courts have to interpret the words, they may consider whether the omissions throw any light on the meaning of the new provisions. To omit " exercise " may well be merely the avoidance of superfluity. It is not easy to imagine an " exercise " which is not a " performance." The other omission looks more substantial. It has always been doubtful how far mandatory requirements like " shall give effect to " were enforceable in the courts when they described the constitutional relationship between Ministers and such public corporations. The courts might have held that the whole provision was the erection of a structure which seemed to establish powers and duties and seemed to use legal terminology but which did not in fact give rise to legally enforceable relationships. The omission of the " effective " clause presumably has the result of leaving the Minister with his more valuable political control but depriving him of his possible remedy at law. It must not be forgotten that Ministers have often been glad to have compulsive powers (especially in the Education Acts) with which to bend local authorities to their will. So that the possibility of real conflict between Ministers and other public corporations should be not considered remote.

A new provision in the Act of 1957 empowers any Electricity Board to make representations to the Electricity Council on any matter relating to the performance of the functions of any other Electricity Board. If it appears to the Council that such representations disclose a defect in the general plans and arrangements of either or both of the Boards, the Council may give advice to the Board or Boards. The Council may make representations to the Minister on any matters arising out of the advice given and if it appears to the Minister that a defect is disclosed in the Board's general plans and arrangements, he may give directions to the Board. This seems a highly formalised procedure for settling disputes between Boards or between the Council and a Board but underlines the individuality of these public corporations as well as the separateness of their legal personalities. Once again, the parallel with local authorities comes to mind. It is too easily assumed that the elective nature and long tradition of independence of local authorities sharply distinguishes them, in this matter of separate identity, from the corporations of a nationalised industry.

Finally, section 38 of the Act of 1957 provides: "It is hereby declared for the avoidance of doubt that neither the Electricity Council nor the Generating Board nor any of the Area Boards are to be regarded as the servant or agent of the Crown or as enjoying any status, immunity, or privilege of the Crown, and no property of the Council or of any of those Boards is to be regarded as property of, or held on behalf of, the Crown." *Tamlin* v. *Hannaford* had decided much of this for the British Transport Commission in 1950, and it has been assumed that the decision covered the other nationalised industries. What is now needed is statutory or judicial classification of the relationship of the Crown to other public corporations, such as Regional Hospital Boards and New Town Development Corporations. The lack of decision is becoming increasingly important and confusing.

The Queen's Speech on November 5, 1957, promised legislation to implement some of the recommendations of the Franks Committee. In the debate on October 31, 1957, on a motion to take note of the Report, the Secretary of State for the Home Department and Lord Privy Seal (Mr. R. A. Butler) indicated the Government's general approval of the Report and some of the recommendations which would be positively accepted. These included the establishment of a single Council on Tribunals to be appointed jointly by the Lord Chancellor and the Secretary of State for Scotland—with a special committee or panel of the Council to deal with matters of special concern to Scotland; the removal of the restriction on legal representation, except perhaps before local service committees under the National Health Service Act; the appointment of chairmen of tribunals by the Lord Chancellor and the Lord President of the Court of Session; the publication of inspectors' reports; and the provision of a statutory right to be heard on objection to acquisition of land by Service Departments. On the other hand, the Government rejected the recommendation that members of tribunals should be appointed by the proposed Council but agreed that Ministers should consult that Council; legal aid is not to be extended to tribunals at present; and inspectors will continue to be appointed by the Minister of Housing and Local Government, but he will be required to consult the Lord Chancellor. Other questions were left open by the Government for further discussion.

THE INDIAN CONSTITUTION TODAY

ON November 1, 1956, India finally completed the task of constitution making on which she had been engaged since 1946. The Constitution of India was adopted in 1949 and went into effect on January 26, 1950. The seven amendments that have been adopted since then must be taken to be part of the original process. The seventh amendment completes the task and gives a final shape to the Constitution.

When the Constitution of India came into force on January 26, 1950, the country consisted of twenty-eight states and two union territories. The states had been divided into three classes. This elaborate classification was mainly a reminder of the fact that till recently one half of the area and one third of the Indian population had hardly ever enjoyed effective democratic government. Today the Union of India consists of fourteen states: Andhra, Assam, Bihar, Bombay, Jammu and Kashmir, Kerala, Madhya Pradesh, Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh and West Bengal. The Union still administers Delhi, the capital of the country, Manipur and Tripura on the North Eastern Frontier, the Andaman and Nicobar Islands, and Laccadive. Himachal Pradesh for the time being is also a Union concern, but it is hoped that it will be merged with the Punjab sooner rather than later.

The new organisation finally removes from the Indian scene Maharajahs and Nawabs as instruments of government. All states now have at their head governors appointed by the Union Government. All traces of a claim to exercise hereditary rule have thus disappeared. The Maharajah of Mysore is even today the head of the new and bigger Mysore State but as a Governor nominated by the Union Government, and not as a hereditary ruler. The Nizam continues to be the richest man in the world; he is, however, no longer the Nizam of Hyderabad, for there is no Hyderabad State now.

When the Constitution took effect on January 26, 1950, the territories of Indian princes stood either merged in the older British Provinces or continued as single states or group of states as part B states. It was impossible to remove all the vestiges of princely rule at once. By now, almost all that distinguished administration of princely India from British India has disappeared. Private armies of the princes have either been disbanded or merged in the Indian Army. All the customs barriers have been removed. One system of currency is now in use throughout the country. Most of the state banks have now been taken over either by the Reserve Bank or the nationalised State Bank of India. Even the luxury of a local time that some states used to enjoy has been given up. The treasuries of the various states have all been taken over by the State Bank of India.

The new scheme makes the Union of India consist of fourteen units all enjoying equal power. The Union territories represent, besides the Union capital, the undeveloped areas on the North East Frontier which have to be governed by the centre for strategic and defence reasons.

When the Constitution was first adopted, students of constitutional law were divided on its precise nature—was it a federation with some characteristics of a unitary state or a unitary government with some federal characteristics? The new set-up that has gone into effect from November 1, 1956, adds a little to this puzzle. Between the federal government of the Union and the governments of its units, a new institution has been interposed, the Zonal Council. The country has been divided into five zones, with a Zonal Council in each zone. Each Zonal Council consists of a Union Minister who will act as the chairman of the council, the Chief Minister of each of the states included in the zone, and two other ministers for every state. The northern Zonal Council will have, in addition, one representative of Delhi and one of Himachal Pradesh. The eastern Zonal Council will similarly have one representative of each of the two union territories, Manipur and Tripura, and the Adviser to the Governor of Assam for Tribal Areas as its additional members.

The functions of the Council include all matters concerning economic planning, border disputes, protection of linguistic minorities and inter-state transport, besides any other matter arising out of the new organisation of the states. The Council may also discuss all questions in which one or more of the states have a common interest. It is an advisory body. It will advise the central government and the government of each member state. It will be an agency of the central government, so far as the payment of its administrative staff and establishment is concerned. State susceptibilities have, however, been respected by making the Chief Minister of each member state act as vice-chairman of the Council for a year in rotation.

This is a new development in the government of the federal state. Though the Zonal Councils will be advisory bodies, on account of the huge development programmes which the country has undertaken, they are likely to provide a very convenient instrument for straightening out development programmes of the member states, and may influence Union and state policy in various directions. It would be possible for the member states to pool their administrative knowledge and help one another in solving various problems the country is facing today. One of the most deplorable features of Indian administration during the last eight years has been the fact that, on account of the different types of administration in pre-1947 India, some administrative problems, which were being faced squarely and successfully by methods old and new in some states, went unattended in others. It is hoped that the exchange of views at the Zonal Council may remove this defect.

With a reduction in the number of states, the number of High Courts has been reduced to fourteen. This again will create High Courts of equal judicial stature in the country. It will also put an end to judicial Commissioner's Courts in states.

The creation of a new Bombay State has resulted in the emergence of certain decentralising agencies in administration. Development councils have been suggested for what may be described as backward regions of the state; Marathawada transferred recently from the State of Hyderabad, Vidharbha transferred from the old State of the Central Provinces, Saurashtra added to the State for the first time now. These development councils will ensure that these areas get their due share of the state resources for their development. Five regional administrators will ensure the speeding up of the work of the administration in the State. It is possible that this institution may be followed in the other big states as well, for example, in Uttar Pradesh and West Bengal. This is all the more likely on account of the fact that India's Second Five Year Plan needs speedier decisions in action which the older organisation seems to be incapable of achieving.

Another new institution which might well be described as a decentralising agency is the regional committee set up in Punjab and Andhra. Both these states have been divided into two regions. In Punjab, the division is based mainly on language, in Andhra on past administrative history. The regional committees will consist of the members of the legislature representing the region. The ministers will also be divided between the two regions presumably on the basis of the constituencies which they represent. The Chief Minister will not be a member of either of the committees. The committees will be in charge of all development programmes in the areas. Though the legislation creating them seems apparently to vest them with administrative power, the working of parliamentary government in the states may make them instruments of administrative decentralisation rather than independent governmental and administrative agencies.

The last eight years have seen a growing tendency towards the Union Government's assuming more and more authority in matters primarily of state concern. The Constitution gave temporary power to the Union Government to control essential supplies. It permitted Parliament to transfer institutions, administrations or subjects from state governments to the Union, if Parliament was of the opinion that they were of national importance. The temporary powers to control the production and distribution of essential commodities have now been made a normal function of the Union Government. Amendments to the Constitution and Parliamentary legislation have vested in the Union Government the control of some 30,000 miles of national roadways, invested the Union Government with the authority to levy taxes on inter-state trade and commerce and transferred the care of a large number of historical monuments to the care of the central government. A River Transport Board has been set up for the development of riverine traffic. A Water Disputes Council will settle disputes among the states about the disposal of the waters and water resources. A statutory University Grants Commission has assumed the task of making Union grants to the universities all over the country with power to secure uniformity of standards and co-ordination of educational efforts. The Planning Commission, though in law an advisory body alone, today directs the development programmes throughout the country. The Union grants, made ostensibly for the purpose of carrying through planned schemes—planned mostly by the Union Government—of progress in what are still state functions, subject the formulation of state policy to Union influences.

A trend in the same direction is the new amendment of the Constitution which enables a state to entrust the carrying out of a state function to the central government or its officers. The Constitution originally allowed the central government to entrust the carrying out of its functions to the state government or its officers. The amendment has completed the circle.

One of the most important features of the Constitution of India is the grant of fundamental rights, in some cases to all persons, in others to citizens alone. Some of these rights have been granted absolutely, others subject to specified restriction. A pointer in the direction that some of these fundamental rights may have to be curtailed was the First Amendment which placed specified land legislation outside the protection to be enjoyed by the right to property. It was but to be expected that the type of land legislation which has been thus secured in certain states could not but be similarly protected in other states. For some time it was fondly believed that legislation passed by various states had been so carefully devised as to be immune from constitutional attack. When, however, the Supreme Court decided otherwise, the Fourth Amendment protected another group of state statutes ushering in land reform and state regulation of trade and industry and also placed beyond challenge future plans in the same direction. It has to be remembered that land reform is the most urgent need of India today. To have failed in carrying through necessary legislation by academic attachment to rights of property would have been more than foolish. It might have demonstrated the failure of democratic government to meet the challenge of a necessary reform.

The watering down of the right to property has followed India's adoption of a socialist pattern of society as its goal. Here again, India has not followed any doctrinaire policy of socialism. When she became independent in 1947, India was industrially so backward that a way to industrialise the country in a hurry had to be devised. In that direction alone lay any possibility of increasing the total national income and, therefore, of raising the very low standard of living in the country. The answer was found in carrying forward the policy of running major new enterprises as national concerns. It involved no break with the immediate past. The British Government in India had run telegraphs, telephones, salt mines, opium factories, railways and distilleries as state concerns. The new government only added to the list industries that India needs today. It necessitated some more amendments to the Constitution. State monopoly of a trade, business or industry was legalised. The control of private property and its subjection to restriction were also placed beyond question.

The right to freedom of expression, as laid down in the Constitution, has also been brought under some control. As the Constitution stood and was interpreted by the Supreme Court, it made it possible for one of the High Courts to hold, though wrongly, that incitement to violence was no offence. Another High Court struck down the law of sedition. A third held unconstitutional a much prized provision in the Indian Penal Code for dealing with unruly and ugly threats to peace and public order. An amendment of the Constitution has now made it possible to place restrictions on freedom of expression in the interest of public order.

Until 1921, the British members of the Indian Civil Service were the rulers of India. When a move toward democratic government was made in the Government of India Acts in 1919 and 1935, the rights and interests of the public servants were variously and vigorously protected. The Constitution followed the Government of India Act, 1935, in certain directions. When difficulties were experienced in removing and dismissing public servants under the existing law, a proposed amendment of the Constitution sought to simplify the procedure for the termination of their services and to make it possible to deal with these cases speedily in one stage instead of two as previously.

The creation of a large class of industrial and commercial civil servants may lead to their being treated differently in the matters of removal and dismissal. They are otherwise covered by the Industrial Disputes Acts.

A curious situation arose when it was discovered that a sitting member of a legislature should not have been elected because he was under age at the time of election. The discovery was made so late, however, that an election petition could not have been filed against him. Though he was disqualified to sit in the legislature, there was no legal machinery whereby he could be compelled to vacate his seat. A proposed constitutional amendment sought to provide remedies against such an impasse occurring again.

India continues to be a liberal democracy where government policy is settled by public discussion and can be openly criticised by those who do not agree with it. Her public servants carry into effect policies devised by her responsible ministers and approved by her legislatures. Laws are openly made by legislators elected through fair and free elections. Her judiciary is independent and renders justice impartially between the state and the citizens. Her public philosophy makes the individual the central figure in this welfare State. Private property has its rights as well as its obligations here.

SRI RAM SHARMA.

To cover the substantial increase in the postal rates the subscription for 1958 to *Public Law* has had to be increased from £2 2s. to £2 5s.

THE ROYAL PREROGATIVE IN MODERN SCOTS LAW

J. D. B. Mitchell

Juristic Views

One historian has commented that " certainly the last charge that will be brought against the Scotch, is that of superstitious attachment to their princes." [1] It is worth considering how far this attitude is reflected in the law, for it is an attitude which is, on the whole, in contrast to that adopted in England. The contrast is pointed by the events of 1688, when, in legal form, the Scots were less gentle to James VII than were the English to James II. It is true that in England excessive claims for prerogative were rejected, yet, even in Blackstone's definition of the prerogative—" that special pre-eminence which the king hath over and above all other persons and out of the ordinary course of common law " [2]—there remains something of the awe of majesty. In later years this awe has been perpetuated in what may be regarded as, at times, excessive deference to the executive. The realism which Maitland urged [3] has been rejected for a continued use of " the Crown " as a governing concept in law. The Crown Proceedings Act, 1947, was a long time in reaching the Statute-book, the continuation until then of the remedy by petition of right, and the sharp cleavage between the Crown and other public authorities, all owe something to this concern with " the Crown," and in all these there are marks of continuance of this awe in relation to it to which reference has been made. With this attitude may be contrasted the treatment of the Crown in the courts in Scotland as far back as the sixteenth century. In 1545 the Lords of Council allowed actions against the king [4] following on an Act of Sederunt of 1542 granting to these dispossessed by the king or his officers authority to call " the Kingis grace Comptroller and advocat to here them reponit to their possessionis as thai had of

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[1] Buckle, *History of Civilization in England* (1873) Vol. III, 2. True he was at this point concerned with the " sale " of Charles I (the price being, he said, the only good thing the Scots received from that monarch), yet the comment is also a general one. Similar assertions can be found in Hill Burton, *History of Scotland*, iii, 388.

[2] *Commentaries*, I. 232.

[3] *Constitutional History*, 418.

[4] *Acts of the Lords of Council in Public Affairs*, 1501–1554, 540.

before."[5] Differences of treatment in the courts of the two jurisdictions are in more modern times evidenced by cases such as *The Creditors of James Burnet* v. *Murray*,[6] denying to the Crown any preference for revenue debts in respect of land; the then existing contrast between the two jurisdictions being well brought out in argument.

It must be admitted that many of the authorities on this matter are old, some reaching back into periods in which it is difficult to state with certainty what was the law. It must be admitted too, that in recent years, for a variety of reasons, differences have tended to disappear, or to be glossed over. A major influence in this process has undoubtedly been the belief that, with the union of the kingdoms, the rules of prerogative must be the same over the whole United Kingdom.[7] Yet as a result of *Glasgow Corporation* v. *Central Land Board*,[8] an investigation of the rules governing the prerogative in Scotland has ceased to be a purely academic exercise. Past theoretical differences have become capable of having present practical consequences. That case not only demonstrated that in one way, at least, the law of Scotland is less kindly disposed to claims of Crown privilege than is the law of England; it also, for the first time, contained clear statements from the House of Lords that the rules governing prerogative need not be identical in both jurisdictions.[9] The practical consequences of this view can be realised if it is remembered that, for example, it was the supposed necessity for uniformity which led Lord Anderson to give a restricted interpretation to the apparently general words of the Crown Suits (Scotland) Act, 1857, s. 1,[10] when a more liberal interpretation probably agreed better with past history.

It is relatively easy to pick upon particular contrasting rules or instances where differences appear. It is much more difficult to be certain what are, or were, the general rules. On the most general plane, the principles of the Declaration of Arbroath[11] can be contrasted with such Acts as the Black Acts of 1584[12] or that of 1606

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[5] *Register of Acts and Decreets*, I. 178. The late Sir Randall Philip has admirably demonstrated the greater readiness of the courts in Scotland to receive suits against the Crown—"The Crown as Litigant in Scotland" 40 *Juridical Review*, 238.

[6] (1754) M. 7876.

[7] Notably *Macgregor* v. *Lord Advocate*, 1921 S.C. 847. Granted the convenience of uniformity, it is not clear why on the whole the choice of rule in cases of doubt should be from the jurisdiction where the rules are more generous to prerogative claims. *Cf.* Lord Cooper in *MacCormick* v. *Lord Advocate*, 1953 S.C. 396 at 411.

[8] 1956 S.C. (H.L.) 1.

[9] *Ibid.*, 16.

[10] *Macgregor* v. *Lord Advocate*, 1921 S.C. 847 at 848. The statute itself was really only concerned with procedure, not substantive rights: *Smith* v. *Lord Advocate* 1932 S.L.T. 374, 378.

[11] Now most easily accessible in Lord Cooper's *Selected Papers*, 324 *et seq.*

[12] A.P.S., III, 292.

Anent the Kingis Majesteis Prerogative or of 1685 For the Security of the Officers of State.[13] The broad justification of absolutism in Sir George Mackenzie's *Jus Regium* was an answer to the limited views put forward in Buchanan's *De Jure Regni Apud Scotos*. Such works must, too, be regarded rather as political tracts than as expositions of accepted legal theories, and the difficulty of finding clear expressions of legal views is enhanced by the reticence of the institutional writers, and others, on matters of public law. Remarks on prerogative are mainly found in the midst of passages dealing with other matters. Thus Craig, founding upon the statute of 1597 c. 281, asserts that taxation can only be levied with the consent of " the people and the estates," but this passage occurs in his general treatment of the patrimony of the Crown.[14] In their *Institutes*, Stair and Erskine confine themselves to particular rules and do not formulate general principles. Stair did, apparently, write upon prerogative [15] but the work does not now exist. Sir John Nisbet, wrote safe generalities—" So that as the Sea does not go beyond the Shoar when the sea is most full, So the Prerogative and *Plenitudo Potestatis* does never go beyond the law which is a great *Littus*, and Boundary of just Power " —yet he was also prepared to support, in effect, the dispensing power.[16] Sir James Steuart, in his *Answers to Dirleton's Doubts*, was equally cautious. " The Author [*viz.*, Sir John Nisbet] thinks justly that the prerogative should keep within the boundary of law . . . but to define its extent is too delicate a point to be further insisted upon." [17] Bankton, though he purports to cover public law as fully as private law, contents himself in his general discussion of prerogative to rules solely dependent upon English precedents and writings,[18] and is the least reliable of the institutional writers.

There is, too, a lack of consistency. The fine declarations of judicial independence by Lord President Seton [19] are matched by the expressions of subservience of Lord Advocate Hope.[20] This inconsistency exists equally between theory and practice both in political matters and in others more strictly legal. The claims by Parliament to control officers, or the declarations of war and peace, and the like, are countered by the factual subservience of Parliament and its control through the Lords of Articles. The ruling that the courts should take no heed of any privy writings from the king,[21] are balanced by the fact that the king would himself sit and act in court and by the continued appointment of Extra-Ordinary Lords of Session. Differences of history have meant that the general issues of prerogative did not come before the courts in Scotland in the same way and at the same time as they did in England, and the conflicts of opinion were resolved by other means and in other places.[22] Yet the circumstances of the monarchy, including its financial weakness, together with the long tradition of formal assertions of the limited character of the monarchy make the statements of the limited view of prerogative more acceptable as embodying the predominant opinion.[23] Certainly that view was expressed by Montrose even when he was advancing the cause of the Crown,[24] and by Stair. " As to the matter of Civil Government," wrote the latter, " since I was capable to consider the same: I have been ever persuaded that it was both against the Interest and Duty of Kings to use Arbitrary Government, that both King and Subjects had their titles and rights by Law, and that an equal ballance of Prerogative and Liberty was necessary for the happiness of a Commonwealth." [25] It is clear from the rest of the *Apology* that in Stair's view this balance was to be kept by the courts.

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[13] A.P.S., IV, I,81 and A.P.S., VIII, 484.

[14] *Jus Feudale,* I,16.16.

[15] See his *Apology* published 1690.

[16] *Dirleton's Doubts voce* Prerogative.

[17] Steuart's *Answers to Dirleton's Doubts voce* Prerogative.

[18] Inst., Bk. IV, Tit. I, § 4 and particularly as to statutes, see IV, 1.4 (44).

[19] *Bruce* v. *Hamilton* (1599). See " The King versus the Court of Session " by Lord Cooper, 58 *Juridical Review*, 83.

[20] *Major Practicks,* V. 1, § 13 (Stair Society ed.). Further, Craig asserted it was a privilege of the royal sceptre that the king might judge in his own causes. *Jus Feudale,* III.i.12.

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[21] *Baron* v. *Earl of Morton* (1533) M. 7319, *Earl of Morton* v. *Lord Fleming* (1569) M. 7325.

[22] Thus the equivalent authority to the *Case of Proclamations* is only found in *Grieve* v. *Edinburgh & District Water Trustees,* 1918 S.C. 700.

[23] Thus, writing of dispensations from taking the Test, Sir John Lauder of Fountainhall wrote in 1685 " which seemed a downright derogation to the Act of Parliament in 1685 and not in the King's power; for Sir George Lockhart said, Whatever that dispensation might operate to secure them for all proceedings, yet if they acted after it they incurred and contracted a new guilt." (Fountainhall's *Historical Notices,* Vol. II, 676.) Though the dispensations might have to be accepted in fact, their legality was not accepted.

[24] See letter of Montrose, *Memorials of Montrose,* Vol. II, p. 43. " There is a fair and justifiable way for subjects to procure a moderate government, incumbent to them in duty which is to endeavour the security of religion and just liberty . . . ' But,' it may be demanded, ' how shall the people's just liberties be preserved if they be not known, and how known if they be not determined to be such?' It is answered the laws contain them and the Parliaments may advise new laws," and " The King's prerogative and the subjects' privilege are so far from incompatibility that one can never stand unless supported by the other." Here is the idea of a monarchy limited by law and of a balance of prerogative and liberty which recurs in Stair.

[25] Stair's *Apology.* This idea of balance occurs again. Writing of the projected terms of the Claim of Rights he says: " The terms of perfecting the King's right seem harsh, implying that the Conventione had a superiority of jurisdiction, whereas the solid ground is, that the King having violated the constitution of the kingdome in both its sacred and civil rights, the conventione, as representing the body politick did declair, that seeing he had violat his pairt of the mutuall engagements, they wer frie of ther pairt, for they could not fall on the on pairt without freedome to the other to liberat themselves, and seeing the violations were so high as to refuse, reject and renounce th government of the kingdome according to its trew constitution, and to assume a despotick and arbitrary government, neither he nor any come of him after that could have any title to reigne." Letter to Lord Melville, April 9, 1689. *The Leven and Melville Papers,* 1689–1691, p. 8.

FEUDAL PREROGATIVES

On the more detailed level there were, of course, particular prerogatives notably those of feudal origin. The rule that the Court of Session alone had jurisdiction over actions involving the king,[26] although later explained on the ground that any other rule would be inconsistent with the dignity of the Crown,[27] was not a rule which was peculiar to the Crown. The same privilege was shared by the Senators and all other members of the College of Justice.[28] The Crown did have privileges in litigation,[29] particular privileges as a superior (though a distinction was drawn between the annexed lands and those falling to the king by ordinary acquisition, wherein, said Stair, "the King utitur jure communi," [30]) and other similar rights by common law, some of which were explicable on a feudal basis, others on a basis of practical necessity.[31] Other rights were conferred by statute, notably the enduring one that the king cannot be prejudiced by the neglect of his officers.[32] Yet there were surprising limitations upon the king's rights. Positive prescription was early held, under statute, to operate against the Crown, and negative prescription was much later also held to operate thus.[33] The rights of the Crown as a creditor were limited,[34] in particular revenue debts had no priority over other debts in regard to heritable property,[35] though there was some considerable improvement in the position of the Crown in these last matters as a result of the Union legislation.[36] That legislation, as will become apparent, played a significant part in the adaptation of ancient prerogative rights to modern State purposes. It is, however, arguable that the effect of this legislation has been greater than its terms warrant, the essential provisions in this connection being found in the Act of Union, ss. 18 and 19,[37] and in the Act of 1707 establishing the new court of Exchequer.[38]

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[26] *A.* v. *B.* (1534) M. 7321.

[27] *Somerville* v. *Lord Advocate* (1893) 20 R. 1050.

[28] Who also enjoyed an immunity from taxation like that of the Crown. Indeed their immunity could at times be said to be more clearly recognised than was that of the Crown.

[29] *Stair,* IV, 2, 5.

[30] *Stair,* II, 4, 2., II, 4, 52., IV, 35, 13.

[31] Such as the automatic vesting of land in the king as *ultimus haeres.*

[32] Statute 1600, c. 14, A.P.S., IV, 231.

[33] *Deans of the Chapel Royal* v. *Johnstone* (1867) 5 M. 414. Approved (1869) 7 M. (H.L.) 19. Earlier there were considerable doubts, see the argument in Ersk. III, 7 37, and see the debate in *Crawford* v. *Sir Thomas Kennedy* (1695) M. 7866. As to positive prescription see *Earl of Leven* v. *Balfour* (1711) M. 10930.

[34] *Sir Henry Wardlaw* v. *Dick* (1620) M. 7871, and for the influence of the Union here see *Commissioners of Excise* v. *Creditors of Earl of Southesk* (1724) M. 7873.

[35] See particularly *Burnet* v. *Murray* (1754) M. 7873. The rejection of the argument here for priority for the Crown claims (based on statutes of Henry VIII) because the English rules were only imported in Exchequer causes is particularly important in view of later developments. Lord Kames in his note to this case (Sel.Dec. 86) is not clear why the king should have any priority in execution against personal estate.

[36] *Ogilvie* v. *Wingate* (1791) M. 7884.

In the main, then, the old rules were, as was only to be expected, related to feudal prerogatives. What is of interest today is to know how far these have been translated into special privileges of a modern central government. The process by which the rule of Crown immunity from taxation has developed provides a convenient starting point for an examination of the emergence of such modern prerogative rules. In this case the development appears most clearly, and once having occurred had widespread consequences, even where the causes which produced it would not themselves have operated directly.

With regard to taxation there were old exemptions for the Crown, but their causes were purely practical. The idea that the king should live " off his own " retained its hold in Scotland much longer than it did in England. Taxation was thus for long merely regarded as a supplement to the king's own revenues.[39] It would, therefore, have defeated the purpose of taxation if it had been extended to the king's lands. Indeed, until 1597, the feuars of the king's lands were themselves exempt, on the theory that by the payment of their feu duties to the king they were already making their appropriate contribution to the national exchequer. When, however, the Church lands were annexed to the Crown there would, under the then system of taxation, have been a consequential increase of burden on the other contributors—burghs and barons. Hence the Act of 1587 (c. 112) first stabilised the position, and that of 1594 (c. 233) provided for the taxation of temporal lands and finally the Act of 1597 (c. 281) taxed the Crown Lands held by subjects. This line of statutes was held, in *Bruce* v. *Veitch*,[40] to import that the king was liable to tax save where an immunity was specifically conferred by a particular statute, or where the tax was personal. The Lord Justice-Clerk (Hope) however drew a distinction. " The original lands of the King, the casualties due to him as universal superior, and the feu duties due by his vassals in his own lands never had been assessed . . . but when lands are once taxed in the hands of a vassal, if the sovereign acquires them *utitur jure communi* and the tax remains; third parties must not be hurt by acquisition of the King." In this statement there is a reflection of old reasoning as far as original Crown lands are concerned, but as to acquired lands the fact of acquisition by the Crown conferred no immunity, and there is no sign of modern doctrines. The Lord Justice-Clerk added a further reason for subjecting the land to taxation—that the naval yard, the taxation of which was in question, was held of a subject superior " The property is vested (for behoof of the Crown) in trustees who are sub-vassals and must pay like any other proprietors."

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[37] s. 18 providing that " the laws concerning excises . . . shall be the same in Scotland from and after the Union as in England." s. 19 envisaging a Court of Exchequer " having the same power and authority as the Court of Exchequer in England." It should though be noted that laws affecting private right were particularly preserved by the Act of Union. Is a prerogative claim which particularly affects an individual a matter of public or private right?

[38] By the Exchequer Court (Scotland) Act, 1707 (6 Ann. c. 26), it was provided that the Court of Exchequer in Scotland " shall and may act and do and proceed therein and thereupon in every respect whatsoever as by law, or as the Court of Exchequer in England, by the constitution, course or practice of or in the said court, hath been or is enabled or hath used or practised to do, in like cases in England." *Earl* v. *Vass* (1822) 1 Sh.App. 229, criticised in the *Glasgow* case, is an example of the improper extension of these provisions.

[39] Thus the number and relative importance of cases involving the rules of law designed to prevent the squandering of the royal resources are an indication of this, *e.g.*, *Officers of State* v. *Lord Dunglas* (1838) 1 D. 300.

[40] F.C., November 28, 1810.

These principles were accepted and applied in *Commissioners for the Affairs of Barracks* v. *Milroy*,[41] though their application was governed by the idea of the avoidance of increasing the burden on other proprietors. Thus, in *Principal Officers of Ordnance* v. *Heritors of the Kirk Session of North Leith*,[42] land upon which Leith Fort was built was held liable for poor's rates, having been acquired from a subject, yet improvements by building upon the land did not increase its value for rating purposes. The reason for this being that the improvements were for the public service. Once again the fact of Crown ownership or occupation was not regarded as significant, though it is true that some hesitation was expressed by the Lord Justice-Clerk (Boyle) and by Lord Glenlee on the ground that the tax might be regarded as a personal tax. Even that hesitation, which does involve some special consideration for the Crown (though it also involves a denial of any absolute immunity), could not, however, be used as a foundation for the application of the modern doctrines of prerogative which are related to the activities of the non-personal Crown. Certainly the opinion of Lord Pitmilly that " the Crown must be liable like any other heritor " affords a poor foundation upon which to build prerogative doctrines.

DEVELOPMENT OF CROWN IMMUNITY

It is clear from the element of compromise in the final decree in the last case that the doubts or hesitations of some of the judges had some effect. Subsequently[43] this immunity of improvements was taken as an indication of a general immunity of the Crown, even though the earlier case could not, as a whole, support that broad principle, nor, strictly, could the partial immunity do so. By that time, however, a substantial change had occurred, largely as a result of *Advocate-General* v. *Garrioch.*[44] The tax involved in that case was the prison assessment. A strong case could be made for levying it on Crown property, since the statute imposing it (2 & 3 Vict. c. 42, s. 44) provided that it should be levied " along with the land tax and in like manner therewith," and Crown lands bore the land tax. Yet the Crown was held not liable to pay. Lord Murray (who had been of counsel for the successful collector in *Bruce* v. *Veitch*) asserted bluntly [45] that " the Crown is not liable to pay taxes, either in respect of property or anything else." The principle upon which immunity was based was that taxes are paid for the better support of the Crown and it would be " inconsistent to take money from the Crown to be paid to the Crown." Little fault can be found with that as a common-sense principle, but it will not explain immunity from local taxation. Nor does it, perhaps, express the reasoning upon which the English rule of immunity is based.[46] *Bruce* v. *Veitch* was distinguished in various ways: that the property in that case was held by trustees who were subvassals, that the decision was a novelty, and that it was simply wrong in law. One part of the process of distinguishing is, however, important. *Garrioch* was in Exchequer. This fact was emphasised by Lord Murray saying: " If this court has jurisdiction, the Act of Parliament constituting the Court [*viz.*, the Act of 1707 referred to above] lays it down that it is to decide according to the law of England." *Bruce* v. *Veitch* was in the Court of Session. It is true that in *Garrioch* Lord Murray and Lord Ivory doubted whether there was any difference between the two systems of law in this matter. Yet it seems these differences did exist, and have been emphasised in other cases. The forum, and hence the governing system of law, should therefore be remembered when general conclusions are drawn from this case.

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[41] F.C., November 21, 1815.
[42] (1825) 4 S. 89.
[43] *Advocate-General* v. *Oliver* (1852) 14 D. 356.

The immediate result of *Garrioch* was a refusal by the Crown to pay the police assessment in respect of the General Post Office in Edinburgh, which had up till then been paid. Although the resultant litigation [47] was in Exchequer, the principles propounded were expressed as being entirely general. " It is," said Lord Jeffrey, " the general, constitutional, and prerogative right of the Crown, as maintained by an unvarying course of decisions, to be exempt from liability for all taxes imposed by statute." Perhaps the word "unvarying" was not a happy one in view of the state of the authorities, but apart from that this statement marks a new departure. As the immunity slowly becomes more certain, its basis also changes. It is now prerogative, no longer that it would be merely sensible to grant immunity from taxation to the body which would receive the tax, and the beneficiary of the immunity is simply the Crown. The idea of "public use," which had earlier played its part, also disappears.[48] It was this change of basis which made inevitable the rejection of the argument that there was no immunity because this was merely a local tax. In one other respect this case is notable. The Post Office was not listed in the Act as having immunity, whereas barracks and other Crown property were. The argument that this omission meant, therefore, that the Post Office was taxable was countered by the extension of the rule that the Crown is not to be prejudiced by the default of its servants to cover the acts of the parliamentary draftsmen; an extension which met that particular argument, but which could have curious consequences in the general field of constitutional law if it were to gain general acceptance.[49]

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[44] (1850) 12 D. 447.

[45] *Ibid.*, p. 451.

[46] As to this, see particularly *Madras Electricity Supply Co., Ltd.* v. *Boarland* [1955] A.C. 667 and *Bank voor Handel en Scheepvaart N. V.* v. *Administrator of Hungarian Property* [1954] A.C. 584. The English rule has been justified on a variety of grounds, some relating purely to rules of statutory interpretation, others involving the assertion that the rule involves an independent prerogative which is itself justified in a variety of ways.

[47] *Advocate-General* v. *Commissioner of Police for the City of Edinburgh* (1850) 12 D. 456. Though reported in 1850, *Garrioch* had been decided in 1845.

GENERAL IMMUNITY

From this start the doctrines of prerogative have grown. Once claims to freedom from taxation of all kinds had been admitted, prerogative was extended to include general immunity from statute. This process may be a reversal of the English developments. There, on one theory at least, freedom from taxation arose because of the doctrine that statutes did not affect Crown rights. In Scotland the development appears to have been the opposite; the effect becomes the cause. Once again the first full acceptance of the doctrine as to statutes came in the Court of Exchequer, and came about from much the same causes. There are references in argument in some of the old cases to the doctrine that the Crown was not bound by statute unless clearly expressed to be so. Yet the doctrine is not to be found as the determining principle in any case, and decisions are by implication opposed to it,[50] and it has been accepted that the doctrine formed no part of pre-Union Scots law.[51] The major case in its acceptance after the Union is, perhaps, *Pool* v. *Irving*.[52] Pool had been imprisoned for non-payment of game duty. He petitioned for aliment under the Act of Grace, 1696. The case was heard before a full court. Seven of the judges, founding upon *Roy* v. *Young and Wilson*,[53] were of opinion that the Court of Session had no jurisdiction in the circumstances to order liberation for non-payment of aliment—to do so would be to interfere in an Exchequer process. They did, however, add, but clearly *obiter*, that they doubted " whether Crown debtors can be comprehended under the terms of the Act of Grace, which contains no words whatever that include the interests of the Crown, or of the officers of its revenue." In these doubts there is manifest the suggestion of the general doctrine that statutes do not bind the Crown. Yet the whole case goes very little way to support that principle. Lord Meadowbank and Lord Corehouse were careful only to join the majority on the final ground of no jurisdiction. Lord Moncrieff denied that " after the Act [of Grace] was passed the Crown debtors stood in any different situation from other debtors," adding " no authority to show that they had not the benefit of the Act had been produced." When the case was resumed in the First Division Lord Gillies and Lord Balgray declared their concurrence with Lord Moncrieff, Lord Craigie found an exclusive jurisdiction in the Court of Exchequer, and the Lord President indicated that in his opinion the Act of Grace did apply to the Crown. The case is then no strong authority for the proposition that statutes do not bind the Crown, no majority of the judges can be found in favour of that proposition and, indeed, the general tenor of the case is against it. The authority of the case for any proposition is further weakened by the fact that after all views had been expressed it was found that Pool had been liberated and no decision was therefore given.[54] Despite these uncertainties, and the fact that, though a post-Union case, it dealt with a pre-Union statute, the general assertions on Crown immunity did have effect.

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[48] Compare the development in England. See J. A. G. Griffith, "Public Corporations as Crown Servants" (1952) *University of Toronto Law Journal* 169.

[49] Such an extension is unjustifiable. The growth of that rule itself is a good example of the development of prerogative rules during the nineteenth century. Its narrow statutory origin has been overlooked until it comes to be often regarded as a general common law principle. For some account of this development see "Some Aspects of the Royal Prerogative" by H. R. Buchanan, 35 *Juridical Review* 49.

[50] *Sir John Crawford of Morquhanny* v. *Sir Thomas Kennedy* (1694) M. 7866. Sir George Mackenzie in his *Observations upon the Acts* seemed to regard a specific exemption as necessary to confer immunity on the Crown. See remarks on Act of 1600, c. 14.

That effect was enhanced when finally a similar case did reach the Exchequer—*Advocate-General* v. *Magistrates of Inverness*.[55] There, the Act of Grace, being a pre-Union statute, was held applicable to the Crown, but it was also accepted that "the Crown likewise maintained that it is a part of the Royal Prerogative that a statute imposing a tax or burden is not held to affect the rights of the Crown, unless this immunity be taken away in express terms in the Act imposing the tax or burden, and it appears to be true that the prerogative of the Crown does now include such a privilege."[56] The reception of the principle was attributed to the fact that the immunity "Belonged to the Crown of England prior to the Union; and like the other laws existing in England at that time regarding the levying of taxes it became part of the prerogative of the Crown of the United Kingdom." The link between immunity from statutory provisions and the new charter of the Court of Exchequer by the Act of 1707 is made clear.

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[51] *Advocate-General* v. *Magistrates of Inverness* (1856) 18 D. 366.

[52] (1831) 10 S. 152.

[53] F.C., February 17, 1824. This case raised similar issues. In it the court was of opinion that the matter was clearly one for Exchequer, but the suggestion was that the Act of Grace should be there applied for the benefit of Crown debtors.

[54] It is noticeable that in an earlier case the Court of Session had no difficulty in holding the Crown liable for the maintenance of a criminal lunatic, but in the House of Lords the Crown was relieved of the burden, though the reasons are not clear: *Officers of State* v. *Commissioners of Supply of Wigtonshire* (1830) 4 W. & S. 43.

[55] (1856) 18 D. 366.

These cases, like *Lord Advocate* v. *Lang*,[57] were not clear cases of taxation, though sufficiently close to be influenced by tax doctrines. They form the means, therefore, by which Crown immunity gained general acceptance. The doctrine was admitted as one having application outside the field of taxation in *Somerville* v. *Lord Advocate*,[58] but, although accepted, was not warmly welcomed. Lord Kyllachy considered that the doctrine could only apply to ancient prerogatives, and that it could not apply in the case of lands held not *jure coronae* but on ordinary tenure.[59] Lord Kincairney (who dissented) suggested similar limitations and affirmed that the provisions of the Act in question, being for the public benefit, bound the Crown. Lord Kinnear likewise distinguished the ancient lands and prerogatives of the Crown from other rights, saying of land acquired from a subject: "The general rule of law with reference to such property is perfectly well settled—that the Sovereign, when he acquires any right from a subject, can be in no better case than his author and so is liable to the same burdens which affected the property in his author's hands." This attitude has persisted[60] and finds perhaps its clearest exposition in the well-known passage in the opinion of Lord President Dunedin in *Magistrates of Edinburgh* v. *Lord Advocate*.[61] The views of Lord Dunedin have been specifically rejected by the Privy Council as expressing the true view of the law in England.[62] Here then is a clear case for the possible application of the principle of diversity expressed in the *Central Land Board* case. The limits to the doctrine of Crown immunity from statute indicated by Lord Dunedin are founded upon a substantial line of authority, as well as being consonant with the general approach in Scots law, and have practical advantages from the point of view of the community at large. Just as was the case in *Glasgow Corporation* v. *Central Land Board*, the balance of convenience inclines to the Scottish rule. In view then of the manner and causes of the reception of the doctrine into Scots law, there seems to be no reason for the further reception of the broader doctrine, and the authority of *Magistrates of Edinburgh* v. *Lord Advocate* should be regarded as undiminished.[63] If this be so, then there may also be further indirect consequences, for example, upon the doctrine that the interpretation by the House of Lords of a United Kingdom statute is binding upon the courts of both jurisdictions.

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[56] *Per* Lord Curriehill at p. 372.

[57] (1866) 5 M. 84.

[58] (1893) 20 R. 1050.

[59] Of the consulted judges four concurred in this opinion.

[60] See particularly *Schulze* v. *Steele* (1890) 17 R.(J.) 47 at 53, *per* the Lord Justice-Clerk.

[61] 1912 S.C. 1085 at 1091—particularly the sentence: "While I do not doubt that there are certain provisions by which the Crown never would be bound—such, for instance as the provisions of a taxing statute or certain enactments with penal clauses adjected . . . yet when you come to a set of provisions in a statute having for its object the benefit of the public generally, there is not an antecedent unlikelihood that the Crown will consent to be bound, and this I think would be so in the case of negotiations which are meant to apply to all land in the city, and where the Crown's property is not property held *jure coronae*."

Effect of the English Doctrine

In the case of these two major doctrines, which have a connected history, it is then true to assert that the development of prerogative rules in Scotland was largely due to the peculiar circumstances of one court—the Court of Exchequer. Nevertheless the emergence of these two doctrines and their similarity to the English rules have had repercussions elsewhere. The tendency has at times been to assimilate all prerogative rules. Thus in *Lord Advocate* v. *Galbraith*[64] Lord Cullen declared that the legislation of Anne had the effect of "extending to Scotland the royal prerogatives generally according to the law of England in relation to all proceedings for the recovery of Crown revenue." Against this view Lord President Strathclyde protested strongly. He regarded it as inconceivable that the whole prerogative doctrines of English law could be imported almost by a side-wind in the manner suggested.[65] Once again there can be indirect, but significant, consequences flowing from these differences. Ancient prerogative rules are now usually of practical importance simply because they have been translated or twisted into rules which assist the purposes of a modern government, even when those purposes and that government are very far from anything which was contemplated at the time when the rules originated. Nevertheless in the present context the question of the former existence of an ancient rule can be important. On Lord Dunedin's view of the effect of statutes upon the Crown the existence of an ancient prerogative right is critical in determining the scope of statutes. Thus the foundation of the judgments in *Re Pratt*[66] is the existence of a general priority of the Crown which was cut down by the Bankruptcy Acts. The latter had, therefore, to be interpreted so as to trench as little upon the prerogative as possible. If this priority be lacking as an original prerogative then the interpretation of the statute could clearly differ in the different jurisdictions. Thus, even in revenue matters, on the view taken by Lord President Strathclyde the limitation on the privileges accorded to the Crown by the old rules may still be important, an importance which would be heightened if Lord Dunedin's view on the effect of statutes be still accepted.

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[62] *Province of Bombay* v. *Municipal Corporation of Bombay* [1947] A.C. 58 at 64. It should be noted that at one stage the English doctrine was similar to that expressed by Lord Dunedin. See Street, *Governmental Liability*, 43 *et seq.*

[63] Though the case is not entirely clear, *Burnett* v. *Barclay*, 1955 J. 37 appears to have been decided upon this view.

[64] (1910) 47 S.L.R. 529. The priority obtained by the Crown in *Campbell* v. *Edinburgh Parish Council*, 1911 S.C. 280, was a statutory one.

[65] *Admiralty Commissioners* v. *Blair's Trustee*, 1916 S.C. 247 at 266. See also Lord Johnston (at p. 260): "the higher prerogative right of England had no existence in Scotland prior to the Union, and . . . the Act of 6 Anne, c. 26, did not introduce into Scotland anything but the English prerogative process based upon the Act of 33 Henry VIII."

In revenue matters, or those akin to them, the major cause of unification of prerogative rules was then statutory. Elsewhere the causes have been different. On occasion there has been no clear Scottish rule and the considerable number of antecedent English cases at the time when one arose in Scotland has made it convenient to adopt the rule that had emerged from these cases. Thus, there are few clear old cases upon the status of Crown servants. Those that there are do not suggest that they were to be regarded as being in a peculiar position because of their employer. Crown grants to offices appear to have been examined in the same way, and to have been subjected to the same rules as other public offices.[67] The incidents of offices are similar whether Crown offices or not.[68] The concern was with the group of "public offices."[69] Indeed, on the abolition of a Crown office, the claim of the former incumbent for compensation was only rejected because he had not shown that his office was *ad vitam aut culpam*.[70] The action for compensation from the Crown was not, as such, ruled incompetent. The issue whether royal grants, pensions and the like were adjudgable and available to creditors tended to be decided in the same way and on the same principles as those involving other pensions. Indeed, often a civil law origin was sought.[71] It is true that in this context Stair particularises the needs of the king's "special service,"[72] but the generality of the relevant principles was emphasised by Erskine.[73] More recently the generality has tended to disappear, and there has been a concentration upon Crown service. Thus, while Lord Constable, the Lord Ordinary, in *Mulvenna* v. *The Admiralty*[74] speaks predominantly of public office, yet in the First Division the emphasis is on Crown service, and new foundations for the rule are sought in the field of prerogative, some of which could be justified in English law though of much less strength (to say the least) in Scots law.[75] Here, though, the process of adoption of the English rule has not been uniform even in modern times.[76]

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[66] [1951] Ch. 225.

[67] *Kennedy* v. *Cuming* (1711) Robertson's Appeals 19, involving the contest between two claimants to the office of Conservator of Campvere, and involving an examination by the courts of the validity of the grounds for the dismissal of one claimant. Compare cases such as *Thomson* v. *City of Edinburgh* (1665) M. 13090 where a town clerk appointed *ad vitam* was dismissible for fault, or *Simpson* v. *Tod* (1824) 3 S. 150 where the court was willing to control the dismissal of a town clerk even though appointed at pleasure.

[68] Thus the arguments about delegation etc., in *Hog* v. *Ker* (1681) M. 13106 are not marked by the fact that this was a Crown office under the Great Seal.

[69] See the emphasis on *munera publica* in *Hastie* v. *M'Murtie* (1888) 16 R. 715 at 732.

[70] *Hay* v. *Officers of State* (1832) 11 S. 196.

This special treatment of Crown servants came about not merely as a result of the understandable desire for uniformity throughout a service which is evident in *Mulvenna,* but also partly as a result of a singularly weak case.[77] Some thirty years after he had taken his discharge from the Army one disgruntled soldier raised an action seeking redress on numerous grounds, some of which were clearly irrelevant. Of his whole claim the Lord Justice-Clerk said "If ever there was a case in which *mora* should bar the claim that case is the present." Upon a variety of opinions expressed in that case, supported by a remark of Lord Kyllachy that "The Crown cannot be liable or sued for damages in respect of the 'Torts'—the wrongful acts of its officers," in an action which was really barred by the Public Authorities Protection Act, 1893,[78] a considerable structure was built. These two cases were treated as authority for the proposition that the king can do no wrong,[79] a doctrine which arrived late, had but a weak foundation, and was received with little enthusiasm in Scots law.[80] It was in fact a doctrine which fitted naturally into the general background of litigation against the Crown in England, but in Scotland had something of an alien air. The circumstances of the creation of the Court of Session tended, as compared with the gradual growth from the Council of the English Courts, to give to the Court of Session in modern times a greater authority in respect of the Crown. Although remarks can be found that the Sovereign cannot be impleaded without his consent yet the comment of Lord M'Laren is, on the whole, a safer guide. "If it be the law of England," he said,[81] "that the Sovereign cannot be convened through his officers in Court, it is probably a just observation that English sources are not a safe guide to the decision of the point which we are considering. I do not think that it was ever doubted in Scotland that the Crown might be called as a defender in a proper action, either through the Officers of State collectively or through the King's Advocate." This attitude was marked not merely by the possibility of raising actions but also by the remedies which could be given. An interdict has been made against the Secretary of State,[82] and, granted an established duty, it has been said that a decree could be granted against the Crown to ensure performance of that duty.[83] In procedural matters, while the Crown has certain established privileges, new claims have been watched with care.[84]

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[71] *e.g., Richardson* v. *Sir William Grant* (1683) where a royal pension was not arrestable as being a *stipendium militare*: Harcarse Tit. Arrestment, and see particularly *Brodie* v. *Campbell* (1715) M. 709. This inclination applied outside this particular context. Thus the privileges of members of Parliament were ascribed to their being *absentes reipublicae causa*: *Grant* v. *Earl of Sutherland,* (1708) M. 8563 or see M.Sup. IV, 719. See also on the equivalent to *The Case of Saltpetre,* Hume-Lectures, Vol. III, 205.

[72] II, 5, § 18.

[73] III, 6, § 7—the privilege extended to many, even to University professors, *Laidlaw* v. *Wylde,* M.App. *voce* Arrestment, No. 4.

[74] 1926 S.C. 842.

[75] *e.g.,* the citation by Lord Ashmore (at p. 861) from *Queen* v. *Lords Commissioners of the Treasury,* L.R. 7 Q.B. 387, which fairly reflects English law but did not express a principle clearly established in Scotland.

[76] *Cameron* v. *Lord Advocate,* 1951 S.C. 165.

[77] *Smith* v. *Lord Advocate* (1897) 25 R. 112.

[78] *Wilson* v. *1st Edinburgh City Royal Garrison Artillery Volunteers* (1904) 7 F. 168.

[79] *Macgregor* v. *Lord Advocate,* 1921 S.C. 847.

There is thus in matters of detail, as well as in relation to the broad rules, evidence of a reluctance to concede claims to prerogative rights. This reluctance is to some extent reflected in the operation of the rules. That the privilege of the Crown should not protect a Crown servant who uses Crown property for his own purposes is obvious enough.[85] In civil matters the courts have on the whole been slow to grant immunities. *Clerk* v. *Dumfries Commissioners of Supply*[86] is an illustration (now overruled) of this reluctance. There is equally the contrast between *Glasgow Court Houses Commissioners*

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[80] See *e.g.*, "The Crown as Litigant in Scotland" by the late Sir Randall Philip 40 *Juridical Review* 238, and Rex Non Potest Peccare by Lord Murray 55 *Scottish Law Review* 1 and 40.

[81] *Somerville* v. *Lord Advocate* (1893) 20 R. 1050 at 1075.

[82] *Bell* v. *Secretary of State for Scotland*, 1933 S.L.T. 519, and in substance in *Russell* v. *Magistrates of Hamilton* (1897) 25 R. 350.

[83] *Carlton Hotel Co., Ltd.* v. *Lord Advocate*, 1921 S.C. 237 at 249 *per* Lord Salvesen and see Bruce, though compare *Stewart* v. *Bothwell* (1742) M. 7337. More recently see *Griffin* v. *Lord Advocate*, 1950 S.C. 469, involving the same issue, but decided on the grounds that the proper methods of enforcement were parliamentary and administrative, not judicial.

[84] *Principal Officers of Ordnance* v. *Magistrates of Edinburgh* (1860) 22 D. 446. *Ramsay* v. *M'Laren*, 1936 S.L.T. 35, where the Department of Agriculture attempted to depart from normal procedures.

[85] Though this was the defence in *Salt* v. *MacKnight*, 1947 J.C. 99.

[86] (1880) 7 R. 1157, criticised in *Coomber* v. *Berkshire J.J.* (1883) 9 App.Cas. 61.

v. *Glasgow Parish Council*[87] and the recent litigation involving the custodian of enemy property.[88] In the former the Commissioners though regarded as " absolutely bare trustees for the Crown " were not immune from owners' rates in respect of portions of buildings owned by them which were let, even though the rents accrued for the benefit of the Treasury. Yet on the test of what is " Crown income " as laid down by Lord Asquith in the latter case,[89] the buildings must surely have been entitled to immunity.

THE DOCTRINES CONTRASTED

It can then be asserted with some confidence that the approach to questions of prerogative has been different in Scotland. Those differences have been obscured by a series of cases in which the critical point was the peculiarity of the law administered in Exchequer, a peculiarity which has not always been observed. The second major cause of the adoption of English rules has been the desire for uniformity. Here once again there has been some readiness to concede too great a scope to the Act of Union. That Act did not unify even public law, it merely purported to place public law more readily at the disposal of Parliament than private law. Questions involving the practical application of prerogative claims sit uneasily on the border between these two groups of law, which the Act made no attempt to define. It is certainly not possible to regard that Act as compelling uniformity though clearly the circumstances which resulted from it would tend to induce that result. Even though there has been in fact this unifying process, albeit that there was no legal compulsion to that end, yet lingering marks of the different approach remain. There runs through the cases, and has never entirely disappeared, an inclination to separate the personal " crown " from the governmental " crown,"[90] and to limit prerogative claims where possible to the former. Equally there has been an enduring insistence upon the obligations of the Crown, and upon the fact that certain rights existed not for the benefit of the Crown, and hence that the Crown's dealings in those rights must be restricted in the interest of the public.[91] The process of absorption has also been slowed by many things; the differences in general constitutional history and of the history of the courts in particular have played their part. So, too, have forms of government. The board system tended to insulate Scottish government from the central government. Though the Board of Education might be in form part of the Privy Council, in law it would be treated merely as one more statutory body.[92] That attitude could affect the extension of Crown privileges to new bodies. In such matters differences between the jurisdictions may amount to no more than differences in emphasis and degree. They can nevertheless be important, and it remains to be seen what effect the remarks of the House of Lords, denying the need for uniformity, will have in this context. Often there are obvious practical advantages in uniformity.[93] Yet granted the existence of separate courts and of separate systems of law, both of which were preserved by the Union legislation and which make differences inevitable, there can also be advantages to be derived from diversity. It cannot be denied that the English rules relating to the Crown, while no doubt advantageous to governments, can, at times, work hardship to citizens.[94] The continued existence of a parallel system of law which is less liberal to the Crown, yet which does not unduly impede governmental processes, could then be an advantage to both jurisdictions. The attention drawn to this situation by the House of Lords should not pass unnoticed. The full exploration of the significance of those remarks can only be carried out in practice. All that has here been attempted is an indication that differences are genuine, deep-rooted, and of potential importance, and an indication of the ways in which further exploration may be possible.

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[87] 1913 S.C. 194.

[88] *Bank voor Handel in Scheepvaart N.V.* v. *Administrator of Hungarian Property* [1954] A.C. 584.

[89] [1954] A.C. at 632. The contrast is not easy to draw since the commissioners had perhaps an uncertain position between the Crown servants properly so called and those *in consimili casu* discussed in the most recent case.

[90] This division is apparent in *Bruce* v. *Veitch* (*supra*). It is evident in Lord Dunedin's remarks on the scope of statutes and in cases like *Schulze* v. *Steele* (*supra*).

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[91] This is most marked in the case of regalia—see *e.g.*, Lord Normand in *Marquis of Bute* v. *McKirdy*, 1937 S.C. 93, but it is also evident elsewhere, see *e.g.*, *King's Printers* v. *Buchan* (1826) 4 S. 559 *per* Lord Balgray. " In every community there must be certain rights vested in the First Magistrate which are not so much for the benefit of himself as of the public . . . They are rights which it is his duty to exercise equally as much as the subject is bound to give obedience to the law," a remark which in itself indicates how both kings and subjects are to be regarded as under the law.

[92] See, *e.g.*, *Macfarlane* v. *Mochrum School Board and Others* (1875) 3 R. 88 at 98. " The Board of Education seemed to contend, in the argument which was addressed to us, that they stand in a peculiarly protected position here as being in effect a department of government. It appears to me that there can be no distinction of persons as regards matters of this kind."

[93] Particularly in cases such as *Moffat Hydropathic Co., Ltd.* v. *Lord Advocate*, 1918 (2) S.L.T. 220.

[94] Most recently see *Nottingham Area No. 1, Hospital Management Committee* v. *Owen, The Times*, October 17, 1957.

CROWN PROCEEDINGS: SOME RECENT DEVELOPMENTS

G. H. TREITEL

THE Crown Proceedings Act, 1947, has in almost ten years of operation given very little trouble to the courts. Few cases have been brought under it,[1] and very few have been thought worth reporting. When the Act was passed, some of its provisions were severely criticised,[2] but since then only one of those provisions has been applied in a reported case.[3] That is not to say that they are without practical effect. Section 9, for instance, which protects the Crown from tortious liability in respect of the loss of a postal packet,[4] was clearly at work behind the scenes in *Triefus & Co.* v. *Post Office*[5] where the plaintiffs unsuccessfully claimed damages for the loss of a packet of diamonds sent by them by registered post to New Zealand. Section 9 in effect drove them into the desperate and historically hopeless course of framing a claim in contract which would much more naturally have been brought in tort. Ironically enough, the plaintiffs were defeated by dicta from eighteenth-century cases which in modern terminology would be described as actions in tort.[6]

It is not proposed to recapitulate these criticisms of the Act here. So far as the interpretation and evaluation of the Act are concerned, the experience of ten years has contributed very little. But the Act is of interest not only for its express provisions, but also for the assumptions which it makes or may make. Thus the Act makes the Crown liable in tort, but gives no clear answer to the question whether the Crown is bound by statutes reforming the law of torts in the absence of an express or necessarily implied provision to that effect. Again, the Act refers to agents, officers and servants of the Crown, but the precise meaning of these terms is open to doubt. Legislation and judicial decisions in the last ten years have contributed to the solution of these problems. Lastly, the Act assumes that the Crown is liable in contract,[7] but leaves many questions as to the extent of this

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[1] See Allen, *Law and Orders*, 2nd ed., 358.

[2] Williams, *Crown Proceedings*; Street (1948) 11 M.L.R. 129, and see the same writer's later work, *Governmental Liability*.

[3] s. 10. See *Adams* v. *War Office* [1955] 1 W.L.R. 1116.

[4] For criticism, see Williams, *op. cit.*, p. 60; Street, *Governmental Liability*, p. 46.

[5] [1957] 2 Q.B. 352.

[6] *Lane* v. *Cotton* (1701) 1 Ld.Raym. 646; *Whitfield* v. *Lord Le Despencer* (1778) 2 Cowp. 754.

[7] s. 1.

liability unanswered. One such question in particular—liability on unauthorised contracts—has recently undergone an interesting development. It is with these matters that the following discussion is concerned.

STATUTES REFORMING THE LAW OF TORTS

Conflicting views have been expressed on the question whether the Crown is bound by statutes reforming the law of torts, such as the Fatal Accidents Act, 1846, and section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934.[8] There is no reported decision on the point,[9] but a number of recent statutes, if they do not solve the problem, at least give food for thought. Before discussing these statutes, it will be as well to consider the arguments which can be based on the Crown Proceedings Act itself.

The following arguments can be advanced in favour of the view that the Crown is not bound generally by statutes reforming the law of torts. (i) The Crown Proceedings Act contains no express provision to make such statutes binding on the Crown, and accordingly the principle that the Crown is not bound by statutes in the absence of an express or necessarily implied provision to that effect applies. This principle is expressly preserved by the Crown Proceedings Act.[10] (ii) If the Crown were bound by statutes reforming the law of torts, it would not have been necessary to make specific provisions extending some such statutes to the Crown; yet the Act contains a number of express provisions of this nature. Of course, it is arguable that these are due to excess of caution; but it is strange that caution should be so careless as to refer to some statutes reforming the law of torts and to pass over in silence others which are equally important. The principal provisions of the Act which are relevant in this context are—

Section 4 (2). This subsection extends to the Crown Part II of the Law Reform (Married Women and Tortfeasors) Act, 1935, which relates to proceedings against, and contribution between, joint and several tortfeasors. It may be possible to discount this provision by arguing that it is merely consequential on the preceding subsection which extends to the Crown the general law as to contribution and indemnity.

Section 4 (3). This subsection extends to the Crown the Law Reform (Contributory Negligence) Act, 1945, which amends the common law relating to contributory negligence. This extension is expressed to be " without prejudice to the general effect of section

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[8] Williams, *op. cit.*, pp. 55–58; Street, *loc. cit.*, 134.

[9] The point might have been, but was not, argued in *Adams* v. *War Office* [1955] 1 W.L.R. 1116.

[10] s. 40 (2) (*f*).

one of this Act." These words were drafted when the present section 2 of the Act was section 1 of the Bill and were, by an oversight, not amended when the present section 1 of the Act was introduced, so that the original section 1 of the Bill became the present section 2 of the Act.[11] Had the necessary amendment been made,[12] it would be possible to argue that section 4 (3) did not, by expressly applying the Law Reform (Contributory Negligence) Act, 1945, to the Crown, tend to suggest that other statutes reforming the law of torts only bound the Crown by virtue of similar express provisions. It might even be possible to advance this argument if the opening words of section 4 (3) were utterly meaningless in relation to section 1. They must, it could be argued, have been intended to have some effect, and the court could be invited to deduce from the Act itself, rather than from its Parliamentary history, that " one " was a mistake for " two." But unfortunately the opening words of section 4 (3) are not quite meaningless in relation to section 1: they are capable of referring to proceedings in tort against the Crown in respect of the activities of the Ministry of Transport.[13]

Section 6. This section extends to the Crown the first three sections of the Maritime Conventions Act, 1911, which relate to the apportionment of damage or loss caused by vessels and deal with such matters as contributory negligence and " *loss of life* or personal injuries." [14]

Section 24 (3). This subsection extends to the Crown section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, which relates to interest on debts and damages. No mention is made anywhere in the Crown Proceedings Act of those provisions in the 1934 Act which amend the law of torts.

Section 32. Before 1948, there was authority for the view that a petition of right did not lie in respect of a wrong committed in the previous reign on account of the maxim *actio personalis moritur cum persona.*[15] Section 32 now provides that no claim by or against the Crown shall be affected by the demise of the Crown. Thus where the sovereign dies the Crown is, in effect, bound by section 1 of the Law

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[11] Williams, *op. cit.*, p. 56 n. 66.

[12] As has been done in relation to Northern Ireland: Northern Ireland (Crown Proceedings) Order, 1949 (1949 S.I. No. 1836), s. 4.

[13] Crown Proceedings Act, 1947 (hereinafter C.P.A.), ss. 1, 39 (2).

[14] In addition C.P.A., ss. 5 and 7, extend to the Crown those provisions of the Merchant Shipping Acts, 1894–1940, which limit the liability of owners of ships, docks and canals. *Quaere* whether the Crown could not have taken the benefit of these provisions without such express extension: *cf.* C.P.A., s. 31 (1).

[15] *Viscount Canterbury* v. *Att.-Gen.* (1843) 1 Ph. 306, 322; *cf. Att.-Gen.* v. *Köhler* (1861) 9 H.L.C. 654, extending the maxim to a quasi-contractual claim to which in private law it would not apply.

Reform (Miscellaneous Provisions) Act, 1934, but no provision is made for the converse case where a person injured by the Crown dies.

On the other hand, the following arguments can be advanced in favour of the view that the Crown is generally bound by enactments reforming the law of torts. (i) Insofar as section 10 of the Act exempts the Crown from liability for causing the death of a member of the armed forces, it assumes that the Fatal Accidents Act, 1846, or section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, or both these enactments, bind the Crown. (ii) Under section 2 of the Act, the Crown is made liable in tort "as if it were a private person." Since a private person is bound by statutes reforming the law of torts, so is the Crown.[16] But section 40 (2) (*f*) provides:

> "Except as therein *expressly* provided, nothing in this Act shall . . . affect . . . any presumption relating to the extent to which the Crown is bound by any Act of Parliament."

It is submitted that the express provisions affecting this presumption are those which have been mentioned in the preceding five paragraphs of this article, and that the phrase "as if it were a private person" can at the most be construed as an implied provision to this effect. It is thus difficult to see how it can have the effect contended for. Nor does this view make the phrase redundant or meaningless. There are certain concepts of private law which could not without some difficulty be applied to the Crown. It is for the purpose of the applicability of these concepts that the Crown is to be treated "as if it were a private person." In *The Truculent*[17] a collision occurred at sea for which one of His Majesty's submarines was three-fourths to blame. The Admiralty claimed a declaration that the liability of the Crown was limited in accordance with section 503 (1) of the Merchant Shipping Act, 1894, on the ground that the accident had occurred without the "actual fault or privity" of the owner. Section 503 of the Merchant Shipping Act now applies "with any necessary modifications" to limit "the liability of His Majesty in respect of His Majesty's ships."[18] Willmer J. held that "His Majesty" did not refer to His Majesty in a personal but in a corporate sense; that he must approach the question "on the footing that the Admiralty are in the position of owners"[19]; and that the principles to be applied in determining whether the Admiralty were guilty of "actual fault" were those which governed the question whether a limited company was guilty of "actual fault." Thus, in accordance with the well-known principle stated by Lord Halsbury in *Lennard's Carrying*

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[16] Williams, *op. cit.*, pp. 55–56.
[17] [1952] P. 1.
[18] C.P.A., s. 5 (1).
[19] [1952] P. 1, 19.

Co. v. *Asiatic Petroleum Co.*,[20] the question to be decided in the present case was whether the " directing mind " of the Admiralty was guilty of " actual fault." For the purpose of the action, the " directing mind " was that of the third Sea Lord; he was guilty of " actual fault "; and thus the claim to limit liability failed. Now of course it could be argued that the analogy between the Admiralty and a limited company is far from precise. None the less, the approach adopted in *The Truculent* is fully justified by the provision that section 503 of the Merchant Shipping Act shall apply to the Crown " with any necessary modifications "; and it would be equally justified under section 2 by the words " as if it [the Crown] were a private person."

It remains to consider the effect of legislation passed after the Crown Proceedings Act on this question. The Civil Aviation Act, 1949, contains provisions reforming the common law in relation to trespass and nuisance committed, and damage done by aircraft.[21] " Aircraft belonging to or exclusively employed by His Majesty " are expressly exempted.[22] In so far as the Act *relieves* aircraft from liability,[23] this provision can be explained simply as a statutory reversal of the principle that the Crown can take advantage of an Act of Parliament although it is not named therein.[24] But in so far as the Act *imposes* liabilities which do not exist at common law [25] the express exemption of His Majesty's aircraft seems to be based on the assumption that the Crown is now bound by statutes reforming the law of torts unless those statutes expressly provide the contrary. The opposition assumption underlies the Law Reform (Personal Injuries) Act, 1948, the Law Reform (Limitation of Actions, etc.) Act, 1954, and the Occupiers' Liability Act, 1957, which all expressly bind the Crown. The Act of 1957 contains somewhat elaborate provisions, the effect of which is that the new duties created by the Act bind the Crown as statutory duties.[26] Section 4 of the Act of 1948 and section 5 (1) of the Act of 1954 simply provide that " This Act shall bind the Crown." The effect of these provisions on the present problem is complicated by the fact that the 1954 Act amends a number of other statutes reforming the law of torts, notably the Fatal Accidents Act, 1846,[27] and the Law Reform (Miscellaneous Provisions) Act, 1934.[28] " This Act " in section 5 (1) of the 1954

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[20] [1915] A.C. 705, 713.

[21] s. 40.

[22] ss. 49 (3), 66 (1). For the special rules which apply to such aircraft, see Halsbury's *Laws of England*, Simonds ed., Vol. 5, pp. 17 *et seq*.

[23] s. 40 (1).

[24] C.P.A., s. 31 (1), enacting the common law rule.

[25] s. 40 (2).

[26] s. 6.

[27] Law Reform (Limitation of Actions, etc.) Act, 1954, s. 3.

[28] *Ibid*., s. 4.

Act includes those amendments, and it is difficult to see how the Crown can be bound by the amendments unless it was already bound by the statutes amended.[29] In this state of conflicting assumptions, what is one to make of the fact that the Defamation Act, 1952, does not mention the Crown at all? Of course, most of the provisions of that Act favour the defendant, so that the question whether they " bound " the Crown could only arise if the Crown were to bring an action for defamation. Such a possibility is too remote to require discussion. But suppose that a servant of the Crown, acting in the course of his employment, spoke defamatory words calculated to disparage the plaintiff in his profession. Would the Crown be liable in the absence of proof of special damage although the words were not spoken of the plaintiff " in the way of " his profession, or could it be argued that section 2 of the Defamation Act, 1952, did not bind the Crown?

No very confident answer can be given to this question. The arguments which deny that the Crown is, by virtue of the Crown Proceedings Act, bound by statutes reforming the law of torts seem on balance to be stronger that those which assert that the Crown is so bound; but they can hardly be said to put the matter beyond doubt. That there should be uncertainty on such a point is deplorable. If Parliament finds the time to put into effect at least some of the suggestions that have been made elsewhere for the reform of the Crown Proceedings Act, the opportunity might well be taken of solving the present problem by enacting that, in the absence of express legislative provision to the contrary, all existing and future statutes reforming the law of torts should bind the Crown.

AGENT, OFFICER, AND SERVANT

The Crown Proceedings Act uses three terms to describe a relationship which may exist between an individual or a corporation on the one hand and the Crown on the other: agent, officer, and servant. The last term is not defined in the Act; the other two are defined in section 38 (2):

> " In this Act, except in so far as the context otherwise requires or it is otherwise expressly provided, the following expressions have the meanings hereby respectively assigned to them, that is to say:
>
> ' Agent,' when used in relation to the Crown, includes an independent contractor employed by the Crown; . . .
>
> ' Officer,' in relation to the Crown, includes any servant

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[29] A similar argument could perhaps be based on s. 2 (5) of the Law Reform (Personal Injuries) Act, 1948, qualifying a rule of common law which had become engrafted on the Fatal Accidents Act, 1846.

> of His Majesty and accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown."

The difficulty in interpreting these definitions lies in the word "includes." This word "is very generally used in interpretation clauses to enlarge the meaning of words"[30] but it may, if the context requires this construction, simply mean "means."

Agent

Although it has been suggested that the effect of the above definition is that agent *means* independent contractor,[31] it is submitted that there is nothing in the context to require such a strained construction and that the definition was intended to have, and has, an enlarging effect. If "agent" merely meant independent contractor, the word could not refer to those bodies who act on behalf of the Crown but between whom and the Crown there is no contractual relationship. It is submitted that the word "agent" refers primarily to such persons or bodies and that it thus refers to such statutory corporations as are often called loosely Crown "servants." Since these are not in any contractual relationship with the Crown, they cannot with strict accuracy be described as servants or as contractors. Nor does it seem correct to call them independent. It may be that no definite criterion has yet emerged to determine the question whether a public corporation is a Crown "servant"[32] but since the decision of the House of Lords in *Bank voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property*[33] the criterion of the degree of control exercised over the corporation by the Crown through a Minister is entitled, if not to exclusive recognition, at any rate to pre-eminence. It would be paradoxical to refer to a corporation over which the Crown exercised a high degree of control as an "independent" contractor.

It is not proposed here to discuss yet again the general question of the status of public corporations, but to direct attention to a narrower question: to what extent, and with what consequences, can public corporations be regarded as agents of the Crown for the purpose of involving it in vicarious liability under section 2 of the Act? The Central Land Board forms a convenient starting point for the discussion, since conflicting views have been expressed on the question whether the Board is a Crown "servant" for the present purpose.[34] It appears that the official view is that the Board is an agent of the Crown, for it is now included in the list of "authorised departments" published by the Treasury under section 17 of the Act.[35] Such inclusion does not, of course, compel the courts to hold that the Board is an agent of the Crown for the present purpose; but it is difficult to imagine that they will depart from the official view, especially as it appears to be based on a dictum of Denning L.J. (as he then was)[37] which has recently been approved by the House of Lords.[38]

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[30] *Dilworth v. Commissioner of Stamps* [1899] A.C. 99, 105.
[31] Williams, *op. cit.*. p. 30.
[32] Street, *op. cit.*, p. 29, lists no fewer than nine different criteria.
[33] [1954] A.C. 584.

The basis of the judicial view that the Central Land Board is an agent of the Crown is that section 3 (3) of the Town and Country Planning Act, 1947, provides that the Board shall act "on behalf of" the Crown. In *Hills (Patents), Ltd.* v. *University College Hospital Board of Governors*,[39] however, it was held that the Board of Governors of a teaching hospital were "in a position far superior to that of an ordinary agent"[40] in spite of the fact that under section 12 (3) of the National Health Service Act, 1946, they acted "on behalf of" the Minister of Health. Accordingly, they were capable of occupying premises for the purpose of section 30 (1) (*g*) of the Landlord and Tenant Act, 1954: the occupation was their own occupation and not the Minister's. Of course, it is arguable that the decision does not affect the present discussion since a body may have Crown status for one purpose but not for another; and since in any event the question whether the Board of Governors of a teaching hospital is an agent of the Crown for the purpose of involving the Crown in tortious liability cannot arise.[41] But the case at the very least serves as a warning that the statutory phrase "on behalf of" provides no easy solution of the present problem.[42]

Various other attempts to provide a solution have been made in recent statutes. Thus the Television Act, 1954,[43] and the Electricity

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[34] Williams, *op. cit.*, pp. 27–28, 31–32; *contra* Allen, *op. cit.*, p. 365; Griffith, 9 University of Toronto L.J. 187–188.

[35] For a copy of the list of authorised departments, see Halsbury's *Laws of England*, Simonds ed., Vol. 11, p. 14, n. (*l*).

[37] *Tamlin* v. *Hannaford* [1950] K.B. 18, 25.

[38] *Glasgow Corporation* v. *Central Land Board*, 1956 S.C. (H.L.) 1, 9.

[39] [1956] 1 Q.B. 90.

[40] *Ibid.*, p. 98.

[41] The Board is liable in tort "as if [it] were acting as a principal": National Health Service Act, 1946, s. 13 (1). A private person is not liable for the torts of an agent who by statute is liable as if he were a principal. Hence the Crown (which is liable for the torts of its agents as if it were a private person) is not liable for the torts of hospital authorities. In view of the large number of claims in tort which have been brought against hospital authorities since 1947 it is not necessary to labour this point further.

[42] For other statutes in which the phrase occurs, see National Assistance Act, 1948, Sch. I, para. 9; Department of Scientific and Industrial Research Act, 1956, s. 1.

[43] s. 1 (12).

Act, 1957,[44] contain clear provisions denying Crown status to the corporations established under them. Similarly, the Atomic Energy Act, 1954,[45] and the Sugar Act, 1956,[46] make it clear that for some specified purposes the corporations created by those Acts shall be regarded as agents of the Crown but that for all other purposes they shall not be so regarded. Unfortunately, however, most statutes creating public corporations make no provisions as to the status of those corporations. To mention only a random selection of recent examples, the incorporating statutes contain no provision to define the status of the Agricultural Wages Board,[47] the Colonial Development Corporation, [48] the River Boards,[49] the Foreign Compensation Commission,[50] the White Fish Authority, [51] the Iron and Steel Board or the Iron and Steel Holding and Realisation Agency.[52] The Prison Act, 1952, is equally silent as to the status of the Prison Commissioners, but the problem of their status for the present purpose is virtually settled by their being listed as an " authorised department " under section 17 of the Crown Proceedings Act. Perhaps the most confusing provisions are those concerning the National Research Development Corporation.[53] The incorporating Act is silent as to the status of the corporation but expressly provides that the corporation is not to be exempt from rates and taxes.[54] Such a provision can be relied on both in favour of the view that the corporation in other respects lacks, and in favour of the view that it in other respects has, the status of a Crown agent.

It is not suggested that the problems presented by such statutes are insoluble. But, assuming that the " degree of control " test determines whether a particular public corporation is an agent of the Crown, the difficulties of applying such a test in practice are notorious.[55] In many branches of the law, where the courts have to reconcile the demands of certainty with those of justice, such difficulties are inevitable. But in the present context there is no question of justice at all.[56] There is only a question of procedure and accounting: should the damages be paid by the "appropriate Government department"[57] or out of the corporation's funds? Those who create these corporations should know the answer to this question and should make it plain. It is encouraging that past entreaties to this effect have had their effect in some of the statutes mentioned above. But nothing has been done to resolve the accumulated uncertainty which surrounds the existing public corporations. To urge that special legislation should be introduced for this purpose would at most times be regarded as a Utopian suggestion. One is emboldened to make the suggestion now by the fact that Parliament has recently undertaken a very similar operation. The House of Commons Disqualification Act, 1957, contains a list of commissions, tribunals and other bodies the members of which may not be members of the House of Commons.[58] It would be no greater a task to make a list of public corporations which, for the present purpose, are to be treated as agents of the Crown; and to enact that no other public corporation should be so treated in the absence of an express legislative provision to that effect.

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[44] s. 38.

[45] s. 6 (5).

[46] s. 3 (4).

[47] Incorporated by Agriculture Act, 1948, s. 12.

[48] Incorporated by the Overseas Resources Development Act, 1948, s. 1 (as amended in 1951, 1954 and 1956).

[49] Incorporated by the River Boards Act, 1948, ss. 1 and 2.

[50] Incorporated by the Foreign Compensation Act, 1950, s. 1.

[51] Incorporated by the Sea Fish Industry Act, 1951, s. 1.

[52] Both incorporated by the Iron and Steel Act, 1953, ss. 2, 18.

[53] Incorporated by the Development of Inventions Act, 1948, s. 1 (1).

[54] *Ibid.*, Sch. para. 10.

[55] Writers of great experience in this branch of the law not uncommonly disagree on the status of a given corporation. For example, as to the status of the Agricultural Land Commission contrast Allen, *op. cit.*, p. 365, with Griffith, *loc. cit.*, pp. 187–188.

Assuming that some public corporations are agents of the Crown, it seems at first sight to follow that they can involve the Crown in vicarious liability under section 2 of the Crown Proceedings Act. Since the servants of such corporations are Crown servants[59] no doubt can be entertained as to the liability of the Crown for the torts of such servants. Various objections have, however, been raised against the view that the Crown is liable if a corporation which is an agent of the Crown itself commits a tort. But these objections can all be overcome.

Section 2 (1) (a) provides that the Crown is liable as if it were a private person for the torts of its servants or agents. "A person," it has been said, "is not vicariously liable for his agents unless they are his servants, independent contractors . . . or partners."[60] But it is now settled in private law that vicarious liability extends beyond these categories. Thus if A asks his friend B to drive his (A's) car from Birkenhead to Monte Carlo, A can be held liable for B's negligent driving.[61] If an individual can incur liability for the torts of persons falling outside the above categories, there is no reason why the Crown should not also be liable.

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[56] With the possible exception that specific relief is not available against the Crown: C.P.A., s. 21. But this is a point of small importance in the context of tortious liability.

[57] C.P.A., s. 25 (3).

[58] Sch. I

[59] Griffith, *loc. cit.*, p. 193. The term "servant of" such a corporation, which occurs in a number of statutes, is no worse a solecism than the second "marriage" in cases of bigamy.

[60] Williams, *op. cit.*, p. 30.

[61] *Ormrod* v. *Crossville Motor Services, Ltd.* [1953] 1 W.L.R. 1120.

The proviso to section 2 (1) (a) enacts that no action shall lie against the Crown for the torts of its servants or agents unless apart from the Act the act or omission would have given rise to a cause of action against the servant or agent or his estate. In *Roper* v. *Public Works Commissioners*[62] it was held that a corporation which was an agent of the Crown could not be sued for trespass and nuisance. But the correctness of that decision is open to grave doubt. Two reasons were given. The first was that "an individual cannot by means of an action reach the public funds."[63] But this dictum would demand the rejection of a contractual no less than that of a tortious claim; yet Shearman J. in *Roper's* case followed and applied the earlier decision in *Graham* v. *Public Works Commissioners*[64] that the Commissioners could be sued in contract. Secondly, reliance was placed on *Raleigh* v. *Goschen*[65] and *Bainbridge* v. *Postmaster-General*.[66] In both those cases unsuccessful attempts were made to recover damages from senior officers of the Government in their representative capacity for the torts of their subordinates. In so far as those decisions rest on the ground that the relationship between a senior Government official and his subordinates is not such that one is vicariously liable for the acts of the other, *Roper's* case is clearly distinguishable. No question of vicarious liability arose: the complaint was that the Commissioners had themselves committed a tort by inadequately supervising the premises which had been let to them. In so far as those decisions rest on the ground that a Government official cannot be sued in his representative but only in his private capacity, it is hard to see how they could apply to a public corporation, which has no private capacity, except with the result of making such corporations immune from all actions; but this conclusion, as we have seen, is inconsistent with *Graham's* case. Thus it is submitted that the authorities on which *Roper's* case purports to be based do not support the decision. On the other hand, in *Mackenzie-Kennedy* v. *Air Council*[67] Atkin L.J. (as he then was) said that a corporation which was an agent of the Crown could be made liable "for torts actually committed by it." It is submitted that this view is to be preferred to the decision in *Roper's* case, and that accordingly the proviso to section 2 (1) (*a*) of the Act does not now exempt the Crown from liability for the torts of a corporation which is an agent of the Crown.

Section 2 (6) provides that the Crown is not liable for the act, neglect or default of its "officers" unless those officers have been directly or indirectly appointed by the Crown and are paid out of funds specified in the subsection. It has been pointed out that public corporations (as opposed to their members) are not paid at all [68]; moreover, they are not appointed by the Crown but created by Act of Parliament. But it will be submitted below that an agent is not an "officer" of the Crown; and if this is accepted section 2 (6) does not exonerate the Crown from liability for the torts of public corporations.

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[62] [1915] 1 K.B. 45.

[63] *Ibid.*, p. 52.

[64] [1901] 2 K.B. 781.

[65] [1898] 1 Ch. 73.

[66] [1906] 1 K.B. 178.

[67] [1927] 2 K.B. 517, 533.

Officer and Servant

We have seen that "'Officer' . . . includes . . . servant." [69] It has been suggested that the effect of this definition is that "officer" *means* servant.[70] But "there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve." [71] A public officer is a person who is by law bound to perform duties in the performance of which he cannot be controlled by the person who appoints him. A servant, on the other hand, is by contract bound to perform duties subject to the control of his master. There being this divergence in the ordinary meaning of the two words, it is submitted that "includes" in the definition of "officer" has its usual effect, namely "to enlarge the meaning of words" [72]; so that whenever the word "officer" occurs in the Act it refers not only to servants but also to officers *stricto sensu*. It is superfluous to argue that "officer" does not mean agent or independent contractor,[73] for that is not the natural meaning of the word. "Officer" would only acquire such an extended meaning if there were an express provision to that effect in the Act,[74] or if the context clearly demanded it. For example, section 9 (1) provides:

> ". . . no proceedings in tort shall lie against the Crown for anything done or omitted to be done in relation to a postal packet by any person while employed as a *servant or agent* of the Crown . . . ; nor shall any *officer* of the Crown be subject, except at the suit of the Crown, to any civil liability for any of the matters aforesaid."

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[68] Williams, *op. cit.*, p. 34.

[69] C.P.A., s. 38 (2).

[70] Williams, *op. cit.*, p. 30.

[71] *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co., Ltd.* [1955] A.C. 457, 489; *cf. Lewis* v. *Cattle* [1938] 2 K.B. 454, 457–458.

[72] *Dilworth* v. *Commissioner of Stamps* [1899] A.C. 99, 105.

[73] Williams, *op. cit.*, p. 40.

[74] The draft Crown Proceedings Bill of 1927 (1927 Cmd. 2842) provided: "'Officer' in relation to the Crown includes servant and agent" (s. 30). It is difficult to imagine that this definition was not before the draftsman of the C.P.A.

Here " officer " clearly includes agent as well as servant, for it can hardly be supposed that the section intended to exempt officers and servants, but not agents, from liability. If the view which has been expressed above, that corporations with Crown status are best described as agents of the Crown, is correct, the reason for giving " officer " an extended meaning here is easy to see: unless " officer " included agent, the subsection would not protect the Postmaster-General as a corporation from liability.

For the purpose of vicarious liability, the distinction between officers and servants is no longer important: section 2 (3) of the Act provides that where an officer of the Crown commits a tort while performing or purporting to perform functions conferred or imposed on him by law, the liability of the Crown shall be such as it would have been if the functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown. Difficulties might still arise, however, in determining whether a person is an officer *of the Crown* for the purpose of this subsection, or for the purpose of section 21 (2), which provides that the court shall not grant an injunction " against an officer of the Crown " if the effect of so doing would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown. A police constable, for instance, is clearly an officer (and not a servant [75]), but is he an officer of the Crown? One reason for saying that he is not may be that, in the case of the county police, the Crown takes no part in his appointment. But section 2 (6), in exempting the Crown from liability " in respect of the act, neglect or default of any officer of the Crown unless that officer has been directly or indirectly appointed by the Crown . . ." suggests that a person who has not been so appointed may still be an officer of the Crown, although he cannot involve the Crown in tortious liability. The question whether a police constable is an officer of the Crown for the purposes of the Crown Proceedings Act has never been before the English courts. Proceedings have, however, been successfully taken under the New Zealand Crown Proceedings Act, 1950 (which contains a provision equivalent to section 2 (3) of the English Act, but none equivalent to section 2 (6)), in respect of the tort of a police constable.[76] It must have been assumed that the constable was an officer of the Crown; and it is possible that the English courts may take the same view.[77]

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[75] See, *e.g.*, *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co., Ltd.* [1955] A.C. 457.

[76] *Ellis* v. *Frape* [1954] N.Z.L.R. 341.

[77] See *Fisher* v. *Oldham Corporation* [1930] 2 K.B. 364, 377 (" public servants and officers of the Crown "); *Lewis* v. *Cattle* [1938] 2 K.B. 454, 457–458; *cf.* *Coomber* v. *Berkshire JJ.* (1883) 9 App.Cas. 61.

Similar questions can arise in relation to a great number of public officers. A person may be appointed as an inspector for the purpose of implementing the provisions of one statute,[78] to make reports required under another[79] or for countless other similar purposes. A general solution to the problem whether such persons are officers of the Crown is suggested by the recent decision in *Merricks* v. *Heathcoat Amory*.[80] Mr. Heathcoat Amory, who was Minister of Agriculture, Fisheries and Food, had laid before Parliament a scheme for marketing potatoes, and was about to approve it in the exercise of powers conferred on him by the Agricultural Marketing Act, 1931. The plaintiff brought an action against Mr. Heathcoat Amory personally and against the Minister, claiming an injunction to restrain the defendants from making an order to approve the scheme. It was argued that the functions conferred on the Minister by the 1931 Act might have been conferred on him (i) as an officer of the Crown, or (ii) as a " person designated " by the 1931 Act, or (iii) as an individual. The plaintiff admitted that if the functions had been conferred on the Minister in the first capacity, the action must fail both because it was improperly constituted[81] and because the court had no power to grant the form of relief sought.[82] Upjohn J. dismissed the action on the ground that, in exercising his functions under the 1931 Act, the Minister was acting " as a representative or as an officer of the Crown."[83] But the learned judge went further than this: he doubted the very existence of the category of a "person designated " by an Act of Parliament to perform functions under it:

> " I understand the conception of the first and third categories, but I confess to finding it difficult to see how the second category can fit into any ordinary scheme. It is possible that there may be special Acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity; but in the normal case where the relevant or appropriate Minister is directed to carry out some function or policy of some Act, he is either acting in his capacity as a Minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former."[84]

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[78] *Stanbury* v. *Exeter Corporation* [1905] 2 K.B. 838.

[79] *Field* v. *Nott* (1939) 62 C.L.R. 661.

[80] [1955] Ch. 567. *Cf. Harper* v. *Home Secretary* [1955] Ch. 238, where the question was left open.

[81] It should have been brought against the Ministry, not against the Minister: C.P.A., s. 17.

[82] C.P.A., s. 21 (2):

[83] [1955] Ch. 567, 575.

[84] *Ibid.*, pp. 575–576.

It is submitted that this dictum is not restricted to Ministers, but applies equally to other persons who have functions conferred on them by law and who in the past have been referred to as "public officers." Such persons are now, in the absence of some legislative provision to the contrary, to be regarded as officers of the Crown for the purposes of the Crown Proceedings Act.

UNAUTHORISED CONTRACTS

Perhaps the most interesting recent development in the law relating to Crown contracts concerns the extent to which the Crown may incur contractual or similar liability as a result of the unauthorised act or representation of a Government official.[85] In *Robertson* v. *Minister of Pensions*[86] the plaintiff was injured in December, 1939, during military service. In July, 1940, he was examined by a medical board and declared unfit for service, and in the following year he was assured by the War Office that his disability had been accepted as attributable to military service for pension purposes. But by Royal Warrant of September 15, 1939, the administration of disablement claims in respect of injuries occurring after September 2, 1939, was transferred from the War Office to the Minister of Pensions. It was held that the Minister of Pensions could not now deny that the plaintiff's injury was attributable to service: he was bound by the statement made by the War Office although neither the War Office nor the official who made the statement had been authorised to make it. This decision has been criticised largely on the ground that it might subject the Crown to far more extensive liabilities than a private person incurs for his agent's unauthorised acts. Three lines of criticism require separate consideration.

(i) In so far as *Robertson's* case depends on the doctrine of ostensible authority, it could be said that that doctrine cannot be used to validate an *ultra vires* act.[87] But for the purpose of the case it was permissible to regard the two departments concerned as one, or alternatively to regard them both as representing the Crown. Section 35 (2) (*g*) (iii) of the Crown Proceedings Act provides that in an action against the Crown in the name of one department, the Crown can, with the leave of the court, avail itself of a set-off relating to another department. If Government Departments can be "treated as one"[88] for the purpose of asserting rights, they should be similarly treated for the purpose of being subjected to liabilities. Again, it has been held that reference in a statute to the liability of a Government Department is, unless the department is incorporated, in truth a reference to the liability of the Crown[89]: a similar principle can be applied to powers. The statement made by the War Office was within the powers of the Crown: it was only a matter of "internal management"[90] that the War Office had not been authorised to make it.

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[85] See generally Mitchell, *The Contracts of Public Authorities*, pp. 75 *et seq.*

[86] [1949] 1 K.B. 227.

[87] *Ex p. Watson* (1888) 21 Q.B.D. 301; *Minister of Agriculture and Fisheries* v. *Matthews* [1950] 1 K.B. 148.

[88] The phrase is Lord Cooper's: *Atlantic Engine Co. (1920) Ltd.* v. *Lord Advocate*, 1955 S.L.T. 17, 20. This case was decided under C.P.A., s. 50 (2) (*d*), the equivalent in Scotland to s. 35 (2) (*g*) (iii).

(ii) In so far as the War Office impliedly represented that it had authority to decide the question of attributability, it could be said that this implied representation was one of law, and thus did not involve the Crown in liability. But while some representations of authority are representations of law, others are representations of fact.[91] At the time when the plaintiff received his assurance, a Royal Warrant of June 29, 1940, provided that a disability award might be granted to any person who had been "certified to be disabled in consequence of a disability attributable to military service during the war"; and "certified" was defined to mean "certified by a medical officer or board of medical officers appointed or recognized for the purpose by the Minister [of Pensions]." The War Office's implied representation of authority to deal with the question of attributability can be regarded simply as a representation that the medical board which had examined the plaintiff in July, 1940, had been "appointed or recognized for the purpose by the Minister [of Pensions]." Thus it was a representation of fact.

(iii) Finally, it could be said that the Crown should not have been held liable because neither it nor anyone on its behalf had held the War Office out to the plaintiff as having authority to decide questions of attributability. But in private law the liability of a principal for his agent's unauthorised acts is not confined to cases of holding out.[92] In *Watteau* v. *Fenwick*[93] the owner of a public house was held liable on his manager's unauthorised purchase of cigars although the plaintiff could not claim that the manager had been held out to him as the owner's agent. Wills J. said:

> "The principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that this is

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[89] *Att.-Gen.* v. *Great Southern and Western Ry. of Ireland* [1925] A.C. 754.

[90] *Cf. Royal British Bank* v. *Turquand* (1856) 6 E. & B. 327.

[91] Contrast *Firbank's Executors* v. *Humphreys* (1886) 18 Q.B.D. 54 (fact) with *Rashdall* v. *Ford* (1866) L.R. 2 Eq. 750 (law).

[92] See generally Powell, *Law of Agency*, pp. 63–69.

[93] [1893] 1 Q.B. 346.

> only so where there has been a holding out of authority . . . But I do not think so." [94]

This principle has not escaped adverse criticism [95] but it has not been overruled and was as late as 1952 regarded as good law.[96] It is submitted that *Robertson's* case can be regarded as an application of the principle. Until September 15, 1939, the War Office had exclusive jurisdiction over questions of attributability, and when the plaintiff received his assurance the War Office still had such jurisdiction in respect of injuries occurring before September 3, 1939. The "authority" of the War Office over the plaintiff's claim can thus properly be described as "authority usually confided to an agent of that character."

But in applying the above principle to public law, Denning J. (as he then was) gave it a new formulation:

> "If a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes." [97]

So stated, the principle is too wide even in its own context, for it would validate *ultra vires* acts and apply to representations of law. Such extensions may be desirable, but they could not now be made except by legislation. Moreover, when the newly formulated principle was stated in the context of the question whether an otherwise criminal act could be legalised by an official's assurance, the House of Lords had no hesitation in disapproving it.[98] Any other conclusion would have given officials the dangerous power of dispensing with penal laws. The hard case of the citizen who in reliance on official advice breaks the criminal law [99] is much better left to the discretion of the courts as a matter in mitigation of punishment.[1]

Thus the principle stated in *Robertson's* case must be confined to its proper scope and context. But the recent decision of the Privy Council in *Attorney-General for Ceylon* v. *Silva* [2] puts the very existence of the principle in doubt. The Principal Collector of Customs purported to sell to the plaintiff a quantity of steel plates as "unclaimed cargo." Power to sell "unclaimed cargo" was conferred on the Collector by the Customs Ordinance, but that power

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[94] *Ibid.*, p. 348–349.
[95] For a full account of the controversy, see Montrose, 17 Can.Bar Rev. 693.
[96] *Jerome* v. *Bentley & Co.* [1952] 2 T.L.R. 58 where Donovan J. went to considerable trouble to distinguish *Watteau* v. *Fenwick*.
[97] [1949] 1 K.B. 227, 232.
[98] *Howell* v. *Falmouth Boat Construction Co., Ltd.* [1951] A.C. 837.
[99] *Dennis & Sons* v. *Good* (1918) 88 L.J.K.B. 388.
[1] *R.* v. *Bather* (1950) 94 S.J. 582.
[2] [1953] A.C. 461.

Steel plates

did not extend to the goods in question since they were, or at any rate were assumed to be,[3] Crown property, and since the Ordinance did not bind the Crown. The Privy Council rejected the plaintiff's claim for damages for breach of this contract since the Collector had no authority to sell the goods. He had no actual authority because the Ordinance did not bind the Crown; he had no ostensible authority because he had not been held out by the Crown[4] as having authority to sell the goods, and because " No representation by the agent as to the extent of his authority can amount to a ' holding out ' by the principal."[5] This reasoning is not itself in direct conflict with *Robertson's* case, since it was not suggested in that case that the War Office had actual authority, or that it had been " held out " as having authority. The conflict between the two cases is due to the assumption, which underlies *Silva's* case, that it is only in cases of actual authority or of " holding out " that the Crown is liable for the unauthorised acts of its agents.

We have seen that the liability of a private principal is not so restricted; and the question therefore arises whether there is any reason for giving the Crown special privileges in this respect. The Privy Council justify the decision in *Silva's* case by saying:

> " To hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorised acts nullify or extend the provisions of the Ordinance . . . The subject derives benefits, sometimes direct, sometimes indirect, from property vested in the Crown, and its proper protection is necessary in the interests of the subject even though it may cause hardship to an individual."[6]

With respect, these arguments are not convincing. In the first place, they sound somewhat hollow in a case in which the Crown's reason for refusing to deliver the goods was that they had already been sold to a third party. Secondly, it is true that there may be many cases in which it would be highly undesirable to compel the Crown to deliver up goods alleged to have been sold by it; but this is only an argument against granting specific relief which is, in any event, not available against the Crown.[7] There is no reason why the disappointed contractor should not receive damages or compensation.[8]

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[3] They had already been sold to a third party, but it was not clear whether the property had passed to the third party at the time of the purported sale to the plaintiff. It appears from the argument at pp. 467–468 that the plaintiff did not know that the goods were, or had been, Crown property.

[4] Presumably a holding out by the " directing mind " of the relevant department would have sufficed: *cf. The Truculent* [1952] P. 1.

[5] [1953] A.C. 461, 479.

[6] *Ibid.*, p. 481.

[7] C.P.A., s. 21.

[8] Mitchell, *op. cit.*, especially at pp. 19, 229.

Finally, the reasoning is inconsistent with the earlier part of the judgment. An act done by an agent within his ostensible authority is an unauthorised act: the principal is liable because he is estopped from saying that the act is unauthorised. Had the sale been within the ostensible authority of the Collector, its effect would have been " by unauthorized acts . . . [to] extend the provisions of the Ordinance "; yet it is admitted that the Crown would have been liable. It is therefore submitted that no convincing reasons have been advanced for giving the Crown special privileges in this branch of the law and that accordingly the actual decision in *Robertson's* case is to be preferred to that in *Silva's* case.[9]

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[9] I should like to thank Dr. D. C. M. Yardley, Fellow of St. Edmund Hall, Oxford, who kindly read this article in manuscript and made a number of valuable suggestions for its improvement.

HOUSE OF COMMONS DISQUALIFICATION

CHARLES DOUGHTY, Q.C., M.P.

INTRODUCTORY

THE vast majority of Commonwealth subjects, of both sexes, are now eligible to sit as Members of Parliament in the House of Commons, if they can get themselves elected for any one of the 630 constituencies in Great Britain and Northern Ireland. There are, however, many persons who are ineligible to sit, apart from any disqualification imposed by the House of Commons Disqualification Act. Nothing in recent legislation has affected the ineligibility of seven classes of persons: aliens, infants, lunatics, peers (except Irish peers, unless they are representative peers), bankrupts, felons, and, for limited periods, persons found guilty of corrupt practices at elections.

While little difficulty has been encountered in past or present years in deciding that such persons shall not be Members of Parliament, great difficulty and many changes in policy have taken place with regard to the question of whether the holding of a particular office should or should not disentitle the holder of that office from sitting in Parliament.

The question as to whether holders of particular offices should be disentitled from sitting in the House of Commons first gave rise to active discussion in the first half of the seventeenth century, particularly in the reign of James I. At that period of its history the House of Commons was very active in asserting its right to control its own composition, and in defending and in laying down the extent of its powers and privileges. It carried this out, or attempted to carry it out, by Resolutions. These, while they applied to particular cases, yet claimed only to be applying the laws and customs of Parliament, already established and well known, though in many cases the foundation of this claim was somewhat thin. The principal matter with which the House of Commons was concerned at this time was its relations with its own members: that is to say it objected to its members holding offices under the Crown, which would prevent them from attending the House of Commons, though a clear distinction was drawn between offices which entailed permanent absence and those which entailed temporary absence. It is interesting to note that on this basis ambassadors were not at this time excluded, since the appointment of an ambassador was at that time only regarded as a temporary mission. Since then many other matters, to which reference is made later, have arisen concerning the disqualification of persons from membership, but the House of Commons has always remained, and is today, jealous of appointments which by their nature unduly restrict the attendance of Members in the House of Commons. In the discussions in the Select Committee on the House of Commons Disqualification Bill this matter was constantly before the members of the Committee.

The disqualification of certain Members by the action of Colonel Pride in his " purge " will never, we hope, be repeated. When Colonel Monk declared for a free Parliament (which historic event is the subject of a painting hung in the corridor leading to the House of Commons Lobby), and the Restoration took place in 1660, the new Parliaments found themselves confronted with a new problem regarding the disqualification of Members. No longer was the principal question the relationship of the House of Commons with its own Members, but the question of the relation of the House of Commons with the Crown. The House of Commons was fearful, and not without reason, that a large number of Members who were the holders of paid offices under the Crown might feel themselves bound to support the Crown when the Crown was in conflict with the House of Commons. This loyalty was considered inconsistent with their membership of the House of Commons. At first, in their anxiety to disqualify all such persons, the House of Commons was inclined to overlook the necessity of Ministers sitting in the House of Commons if Parliament was to retain control of Ministers' actions.

EARLY ACTS

The Parliaments of that time, unlike the Parliaments of James I's time, were unwilling to deal with the problem of disqualification by means of Resolutions, probably because they realised that they were seeking to change the existing practice, and could not, by any stretch of the imagination, be said to be simply declaring what the law and practice always had been. Fresh legislation was required, and such legislation was not easy to enact in the face of opposition by the House of Lords and even the refusal of the Royal Assent. In 1701 by the Act of Settlement, the complete disqualification of office-holders was provided for, but such disqualification was only to take place after the accession of the House of Hanover. In fact such wholesale disqualification never took place, but if it had, our constitutional history would have been very different, since the control of Ministers by Parliament would have been impossible and Cabinet Government would not have come about.

By the Succession to the Crown Act, 1707 (the Statute of Anne), the question of the disqualification of office-holders was dealt with in two sections of that Act. These sections decreed that the holders of new offices or places of profit under the Crown should be disqualified from membership of the House of Commons and that if any Member accepted any Office of Profit from the Crown his election was to be void, though he would be capable of being re-elected. The contradictory wording of these two sections led to frequent difficulties for many years to come. In particular it referred in one section to offices " under the Crown " and in the other section to offices " from the Crown," though nowadays the latter is considered to mean the principal Ministerial and Household offices, and the former non-political executive offices and minor ministerial offices.

By legislation through the eighteenth century the division was arrived at whereby non-political office-holders were disqualified and political office-holders were not, though their numbers were strictly limited.

The element of " profit " which was required in an office to render it a " disqualifying " office has probably always been and certainly has been held in recent years to include those offices in which the amount of " profit " was quite negligible, and even to include offices where the " profit " was not only negligible, but no sum of money was in fact received, at the request of the Member, though he was entitled to some quite nominal sum had he so desired.

The House of Commons Disqualification Act, 1782, provided that members should be disqualified who directly or indirectly contracted with Government Departments (" the Public Service," which was held to include the Public Service both at home and abroad). By the subsequent Act of 1801 the same provisions were provided in respect of contracts with the Government of Ireland.

By the Statute of Anne, Members who sat and voted in the House of Commons when disqualified by the provisions of that Act were liable to heavy penalties, and these were recoverable by a common informer. Although the common informer was already a person held in great contempt, nevertheless it would seem that the House of Commons at that time thought that this procedure would ensure that such cases could not be concealed.

By the Acts of 1782 and 1801 severe penalties were laid down for sitting and voting in the House of Commons when disqualified under the provisions of those Acts, and once again it was expressly provided that the penalties could be recovered at the suit of a common informer. As a general rule the House of Commons passed an Act of Indemnity in respect of any Member who had so sat or voted when disqualified, and no action could therefore be brought. However, in the case of Sir Stuart Samuel in 1912, a Select Committee of the House of Commons was unable to agree as to whether he was disqualified by reason of the fact that the firm of which he was a member had entered into contracts with the Secretary of State for India, and the question of law was referred to the Judicial Committee of the Privy Council. They decided that Sir Stuart Samuel was disqualified. In fact Sir Stuart Samuel stood again at the subsequent by-election and was re-elected. The Government introduced an Indemnity Bill but the Opposition gave notice of their opposition to the Bill and the Government did not proceed with it. It is believed that the reason for their not proceeding with the Bill was that they were more than fully occupied with the Marconi inquiry at the time. The result was that a number of actions were brought against Sir Stuart Samuel by common informers. All failed on technical grounds except one. In *Bird* v. *Samuel* ((1914) 30 T.L.R. 323) judgment was given against Sir Stuart Samuel for £12,500, which judgment presumably he was called upon to satisfy. The Common Informers Act, 1951, dealt an almost mortal blow to the activities of this despised and disliked character. However, whether by accident or design I cannot say, the common informer was not prevented from bringing an action against a Member who had sat or voted when disqualified under the Statute of Anne or the Acts of 1782 or 1801. As Acts of Indemnity appear to have been passed in all cases since Sir Stuart Samuel's case, the common informer has not been able to recover penalties from any Member.

THE HERBERT COMMITTEE

Difficulties continued in regard to the general question of disqualification of Members by reason of their holding or accepting places of profit under the Crown, the more so owing to the increase in the number of Government Departments and their Ministers. In 1941 a Select Committee was appointed to inquire into the whole question, although the more immediate problem of the increase in the number of Ministers had been temporarily regularised by the passing of a number of temporary Acts in 1939 and the House of Commons Disqualification (Temporary Provisions) Act, 1941.

This Committee, known as the Herbert Committee from the name of its Chairman, Sir Denis Herbert, inquired not only into the temporary war-time problem, but also into the general question of disqualification in respect of the holding of offices of profit under the Crown. It made a number of recommendations including one that an Act should be introduced bringing into force its recommendations. I do not propose to analyse its findings or recommendations as no

Bill was introduced, and no permanent changes made. At the same time the findings of the Herbert Committee did undoubtedly have a considerable influence upon the Select Committee to whom the 1955 House of Commons Disqualification Bill was referred.

Since the Second World War many cases have occurred where members have been held to have been disqualified for membership of the House of Commons, though in every case the House of Commons passed an Act of Indemnity to protect the Member from the activities of the common informer, and, on the Member resigning the office he held, in every case except one the election was by the same Act validated. At the beginning of the present Parliament there were four cases of Members who were held to be disqualified on the ground that they held very minor offices in respect of which they received trifling remuneration or no remuneration at all. For example Sir Rowland Jennings had merely acted as Auditor of British Legion accounts (not for the purposes of gain but as an act of kindness). The Select Committees appointed to inquire into these cases invariably drew attention to the pitfalls facing Members, and the necessity for bringing up to date the archaic state of the law of disqualification.

The Labour Government which went out of office in 1951 had prepared a Bill on the lines of the recommendations of the Herbert Committee to amend the law and bring it up to date, though they never in fact presented it to the House of Commons. They prepared the Bill after it was discovered in 1949 that three of their Members had become disqualified. This Bill was the actual Bill, or was very similar to the Bill, which was given a second reading in the House of Commons on November 9, 1955. On the second reading of that Bill it became apparent from what was said on both sides of the House of Commons that the Bill did not solve many of the problems. Although it was decided that the Committee stage of the Bill should be taken on the floor of the House of Commons, it was realised that it would not be possible by the process of amendment to make the Bill what it was desired it should be, namely an up-to-date Bill dealing with modern conditions. Accordingly the Government decided to refer the Bill to a Select Committee " because of the intense complexity of the Bill in the parts relating to offices of profit and to contracts " (to quote the words of Mr. R. A. Butler, the Leader of the House). But these were not the only parts in respect of which difficulty had been felt, and indeed when the Select Committee met, the whole Bill was given most careful consideration, not only in its individual clauses, but with regard to the principles underlying the Bill, and every effort was made to bring the provisions up to date and to comply, so far as possible, with modern conditions.

THE SPENS COMMITTEE

I was appointed one of the members of the Select Committee whose Chairman was Sir Patrick Spens, Q.C., M.P., and we met on twenty-eight occasions and, apart from discussions in private by the Committee, heard seventeen witnesses, some of whom submitted written reports. The special report of the Committee was published in the autumn of 1956 and the House of Commons Disqualification Bill was re-introduced in the House of Commons on November 19, 1956, and given an unopposed Second Reading on December 19, 1956. The Bill had by then been extensively amended in the Committee, in accordance with the principles on which the Committee acted, and these were subsequently approved by the House of Commons, who passed the Bill, which became an Act on April 17, 1957.

Reverse Disqualification

Before detailing the changes made by the Act it is interesting to refer to one matter which was much discussed by the Committee and subsequently on the floor of the House of Commons, and in respect of which many questions were put to witnesses; namely the question of " reverse disqualification." This was the phrase used to define the principle that when a Member of Parliament is appointed to a disqualifying office he should lose the office and not his seat in the House of Commons. Naturally, if this principle were adopted and a Member were appointed to a disqualifying office which he desired to accept, it would always be open to him to apply for the Stewardship of the Chiltern Hundreds. There was certainly modern precedent for such " reverse disqualification," though the Committee were referred to a very small number of earlier precedents of no very great weight. The principle was first introduced in modern times in the Electricity (Supply) Act, 1926, which by subsection (2) of section 1 (now repealed) laid down that " a person shall be disqualified for being appointed or being Chairman or a member of the Board so long as he is a member of the Commons House of Parliament." Since 1926 a number of other Acts have laid down similar provisions of " reverse disqualification " and there had therefore grown up a dual practice, namely the older practice of disqualification of a member if he held a disqualifying office and " reverse disqualification." Certainly this dual practice was considered undesirable and, after considerable discussions, it was decided that the older practice should prevail and " reverse disqualification " be not adopted, and indeed that where it existed it should be abolished.

List of Disqualifying Offices

The next matter which was decided upon and which is included in the Act was that lists of offices should be compiled which disqualify Members, or disqualify them for sitting for certain constituencies. The principle which was adopted was that, while membership of the House of Commons should be on as wide a basis as possible, restrictions to such membership should be clearly defined and readily available to candidates for membership and to those interested. The general description of disqualifying offices was therefore abolished and detailed lists were compiled and are included in the Act as Schedules. A very large number of offices was considered in detail by the Committee who applied the tests as to whether the offices were incompatible with membership of the House of Commons, either because they involved the physical impossibility of simultaneous attendance in two places, or because of possible patronage, or because of a conflict of duties. The lists of offices which disqualify are set out in Parts I, II and III of the First Schedule to the Act, and the list of offices which disqualify for particular constituencies is set out in Part IV of the same Schedule.

One reason why the lists of disqualifying offices were preferred to the old practice of merely having a general description of disqualifying offices, was that such lists were considered to be in the interests of greater certainty. Much of the confusion which had arisen in the past, particularly in the recent past, was caused by the fact that Members very often did not realise that some very minor office or appointment held by them, or by one of their partners, was technically an " office of profit under the Crown." It was considered that the lists of disqualifying offices, even if they appeared at first sight a little lengthy, would import a considerable amount of certainty into what had up to then been an uncertain position. It was considered that a would-be candidate at a Parliamentary election, or his advisers, would now be able to decide with some degree of certainty whether he or she was able to sit as a Member, if elected. All that would be required would be to examine lists of offices and appointments (admittedly long ones) and if the candidate held any of the offices then it would be known that he or she was ineligible to sit so long as he or she held that particular office or appointment. In order to try to oblige candidates and their advisers to carry out this very desirable practice, a candidate is now, by the provision of section 11 of the Act, required to include in his written statement of consent to nomination a statement that he is aware of the provisions of the Act, and, to the best of his knowledge or belief, he is not disqualified for sitting as a Member. Whether the new provisions will prevent any difficulties or result in persons being elected as Members when holding a disqualifying office only time can tell, but it is hoped that as practical a system has been devised as is possible in present circumstances. In order to protect a Member or a nominated candidate who might be appointed to a disqualifying office, it was laid down in section 8 of the Act that, with the exception of the obligation to serve in the armed forces of the Crown, no Member or nominated candidate is obliged to accept any disqualifying office.

Crown Employees

In addition to the persons who are disqualified by reason of holding any of the offices or appointments set out in the lists, section 1 of the Act also disqualifies other classes of person; (1) those employed in the civil service of the Crown, whether established or not, and whether part-time or whole-time, (2) a member of any police force maintained by a police authority, (3) a member of the legislature of any country or territory outside the Commonwealth or (4) a member of any of the regular armed forces of the Crown.

These last mentioned provisions relating to civil servants and members of the police are not new, since it has always been taken for granted that either occupation is wholly incompatible with membership of the House of Commons. Members of other legislatures inside the Commonwealth are unlikely to become Members of the House of Commons owing to the physical difficulties of dual attendance involved, but the Act does make it quite clear that any Member of a legislature of a country like Southern Ireland who might otherwise be qualified to become a member, is disqualified by section 1 of this Act.

The provision relating to members of the armed forces was fully considered and the Committee were of the opinion that all members of the armed forces, except regular members engaged in full-time service duties, should be eligible for membership of the House of Commons. Therefore section 3 was added to the Act for the purpose of excluding from disqualification all ranks of the armed forces, except those regular members on full-time service. Even a pensioner recalled for service is not disqualified however long the period of recall. Incidentally the same section removes any possible disqualification of members of the Royal Observer Corps, except those employed whole-time, but in so doing, by implication, assumes such persons to be employed in the civil service of the Crown.

Future Disqualifying Offices

It was realised that new disqualifying offices would almost certainly be created in the future, and in any Act or Regulation creating such offices it will become necessary to insert a provision declaring that the holder shall be disqualified from being a Member. If any such office should be created without such provision and the House of Commons should subsequently wish to add the office to a disqualifying list, or if the House of Commons should wish to remove an office from a list of disqualifying offices, then by section 5 they have power to do so by an affirmative Resolution, without the necessity of passing an amending Act.

Orders of Indemnity

In the past when a Member of Parliament has been found to have been occupying an office which disqualifies him or her, the general, though not invariable, practice has been for the Member to resign his or her office, and for an Act of Indemnity to be passed by Parliament. The power of Parliament thus to indemnify a Member is not taken away, but, by section 6 the procedure is varied. No longer is an Act of Parliament necessary. In future the House of Commons may pass an Order that such disqualification may be disregarded, provided the Member is no longer disqualified, which means in nearly every case that he has resigned his disqualifying office.

At the same time no Member can sit while holding a disqualifying office with any feeling of security, even if his Parliamentary colleagues are unaware of his disqualification, since section 7 of the Act introduces a novel procedure whereby any person who claims that a Member is disqualified, or has at any time since his election been disqualified, may commence proceedings in the Judicial Committee of the Privy Council for a declaration, in which proceedings the Member concerned is respondent. The Judicial Committee may refer any question of fact to the High Court in England, to the Court of Session in Scotland, and to the High Court in Northern Ireland. Presumably in order to protect Members from frivolous applications the applicant has to give security for costs, and the Judicial Committee may order him to give up to £200 security. However, no such declaration can be made if the House of Commons has made the Order referred to above, nor if a decision on the same question is pending, or has been decided, in an election petition.

Both the procedure of Orders of the House and of applications to the Privy Council were inserted with some hesitation, since both were untried, and it was even considered remotely possible that the procedure of applications to the Privy Council might lead to conflict between the House of Commons and the courts. At the same time it was realised that since the activities of the common informer were being ended, some alternative procedure must be introduced to deal with the possible position of a Member continuing to sit and vote while holding a disqualifying office, and the Government of the day refusing to take any action.

The ancient method by which Members of Parliament who wished to cease to sit has been retained. No Member can resign, but the offices of Stewardship of the Chiltern Hundreds and also of Stewardship of the Manor of Northstead have always been held to be disqualifying offices. This is really a fiction as neither of the offices carries either duty or salary. By section 4 of the Act these offices are retained for the same purpose that they have for so long fulfilled, namely, of enabling a Member who wishes to resign his seat to overcome the rule which says resignation, as such, is not permitted to a Member.

Ministers of the Crown

With regard to the question of Ministers sitting in the House of Commons, which had troubled previous generations, this question has been taken a step further, though the matter is not now in any way a controversial one. The overall limit of Ministers is now seventy, of whom not more than twenty-seven can occupy the offices set out in Part I of the Second Schedule, which are the offices which can properly be described as senior ministerial offices.

Crown Pensioners

Probably one of the most sweeping changes introduced by the Act is to be found in section 9. Though the section is short it effects a major change from the practice of centuries. Substantially the reason for this is that over the centuries the practical position has so completely altered. By this section Crown pensioners and anyone contracting with the public service or receiving money for services from the public service is no longer disqualified for membership of the House of Commons.

The position of those in receipt of Crown Pensions can be put quite shortly. It was found in practice that this only referred to a very few pensions of a small amount awarded under the Civil List Acts, and that, generally speaking, these were awarded to people who were elderly, needy and who had a good record in the public service, or their widows. It was considered unlikely that such persons would present themselves as candidates for election and that in the remote possibility of their doing so and being elected, the fact that they received a small amount from the Civil List could not influence their conduct in any way. Therefore, on practical grounds, and in the interests of simplicity and clarity the somewhat elaborate provisions contained in the Bill originally before the House of Commons were omitted, and the ineligibility of such pensioners was removed.

Government Contractors

The far more sweeping change made in respect of government contractors and those self-employed persons who might accept engagements from Government Departments was fully considered in Committee, and considerable evidence taken. The Clerk of the House, Sir Edward Fellowes, gave evidence which was a great help, and I shall make reference to it later. The Committee considered, and on this the House of Commons was in agreement with them, that in the present day, when nearly all contracting business, big or small, is carried out by limited companies, it would be absurd for a Member who might have large interests in, say, a limited company carrying on a building business, not to be disqualified when his company erected a large block of government offices, whereas a Member carrying on, for example, a small furniture business in his own name would be disqualified if he supplied furniture for those offices worth little more than a hundred pounds.

It was soon recognised that any attempt to draft legislation to cover cases of Members who had financial interests through limited companies or through professional partnerships was quite impossible. If share-holding was to be the test, what number of shares or proportion of the total shares would disqualify? Would the holding of shares as trustee for someone else or as beneficiary in respect of shares held by someone else as trustee disqualify? If professional services were included, should work done by an architect partner of an architect Member for a Government Department and of which the Member had in fact no knowledge, disqualify? Thus, when the question was examined difficulties of a wholly insuperable nature were found.

The next question was, how great was the necessity for such disqualification? The evidence given by the Clerk of the House of Commons and the memorandum submitted by him were both instructive and revealing. He was unable to find that there had been any case within the last 150 years where it had been suggested that the Executive had attempted to corrupt or improperly to influence a Member by offering him a Government contract or professional engagement. The Committee also considered that under the present Party system there was much less likelihood of any Government being inclined thus improperly to ensure the support of any particular Member. However, the Clerk to the House of Commons, in his memorandum, stated that it was plain that if any such case did arise, and if a member of the Executive were to offer a Government contract or engagement to a Member in order to influence his Parliamentary conduct, the House of Commons might well treat it as contempt. For these reasons the Committee decided, and the House of Commons approved their decision, that the time had come to abolish the old rule which may have been so necessary and so much more easily enforceable in the different circumstances and conditions prevailing in the eighteenth century and earlier. It remains to be seen whether at any time in the future it will ever be alleged that any Government has sought to influence the conduct of a recalcitrant or troublesome Member by the granting of a Government contract, or any advantage of a similar nature. In my view no such allegation will ever seriously or successfully be made in these days of press freedom and the necessity for continually considering public opinion, and the altered conditions of modern Parliamentary procedure.

Direct Pecuniary Interest

The Committee considered that the abolition of the rule relating to disqualification of Members by reason of their being Government contractors, or benefiting by way of engagement, placed an even stronger obligation on Members to disclose any personal pecuniary interest when speaking in the House of Commons or voting. By a very long-established custom of the House any Member when speaking on any matter in which he himself has a personal pecuniary interest should disclose such interest. In fact in 1940 a Committee of the House of Commons considered that a Member's conduct should be censured because he took no steps to disclose to the House that his private interests were affected when speaking in the House of Commons on certain subjects. There is a rule of practice of the House of Commons, which is set out in Erskine May's *Parliamentary Practice* (15th edition, p. 418), which prohibits a Member from voting in any Division on a matter in which he has a direct pecuniary interest which is not common to Her Majesty's subjects and not a matter of State policy. If a Member should vote on a matter on which, by reason of this rule of practice, he should not have voted, objection must be taken to his vote immediately after the Division in which he has voted has taken place. On the floor of the House of Commons itself, when the voting is carried out in Division lobbies, this is not very easy in practice, though in Standing Committees, where Members vote in their places, no such difficulties arise. That is probably the reason why the practice of objecting to a Member's vote, fortunately a rare practice, has taken place more frequently in Standing Committees than on the floor of the House of Commons.

The exact definition of what amounts to "a direct pecuniary interest, which is not common to Her Majesty's subjects and not a matter of State policy," is not possible. Indeed a Committee which sat to examine this very question reported that such a definition "could only be arrived at and maintained by the enactment of a Standing Order. Your Committee cannot recommend that this should be done.—No Standing Order could include all the possible varieties, present or prospective, of personal pecuniary interest, and any Standing Order must necessarily be both strictly and narrowly interpreted by the Speaker or the Chairman." So the rule of practice remains a matter which British politicians accept, and to which they are accustomed, a rule which they all believe they know, but cannot define, and which has never been exactly defined at any time.

Faced with this situation, it was not found possible for the Committee to recommend that any provision should be inserted in the Act to cover the question of Members who might have a direct pecuniary interest in the matter on which they were speaking or voting. Nor was it possible to suggest that any Standing Order should be enacted. It cannot therefore be said that the Act is deficient in that it lacks any provision for dealing with such a question. No suitable words could in practice have been inserted in any Bill, and if an attempt had been made to do so I do not believe that the House of Commons would have approved them.

Ministers of Religion

The Committee inquired into and considered fully the question of the disqualification of priests in holy orders or ministers of a religious denomination. While changes of various kinds were proposed, generally with the idea of removing some or all of the restrictions on such persons, it was finally decided that no change should be made. It is interesting to note that no religious body seemed anxious for any change to be made. Therefore by section 14 (2), at the very end of the Act, a short subsection was inserted which left the position exactly as it had been before.

The unchanged position of priests in holy orders and ministers of religious denominations is that Church of England clergymen and Scottish ministers and Roman Catholic priests are disqualified by Statute. Ministers of Nonconformist churches and holders of Ecclesiastical office in the Church of Wales are not disqualified. Clergymen of the Church of Ireland are still disqualified by Statute, though the Church of Ireland was dis-established in 1869. That this disqualification continued subsequent to 1869, was not clarified till 1950 when, on the election of the Reverend J. C. MacManaway, a clergyman of the Church of Ireland, as a Member of the House of Commons, the question as to whether his election was void was referred to a Select Committee of the House of Commons. The Select Committee failed to reach a decision, and the question was referred to the Judicial Committee of the Privy Council who reported that he was disabled from sitting and voting in the House of Commons. Subsequently the House of Commons agreed with this report.

Northern Ireland

The present Act, by section 10, was made applicable to the Senate and House of Commons of Northern Ireland, except the section dealing with the number of Ministers who can sit in the House of Commons and the section retaining disqualification in respect of the stewardship of the Chiltern Hundreds. The Parliament of Northern Ireland has power to add to or subtract from the lists of disqualifying offices.

CONCLUSION

The result of the House of Commons Disqualification Act, 1957, has been to make many minor changes and at least one major change in the law relating to disqualification for membership of the House of Commons. The major change is the abolition of the old law of disqualification in respect of Government contractors and Government employment of professional persons. The intention which lay behind these changes was to bring up to date the law and practice relating to disqualification and to make that law and practice as clear and precise as it can possibly be. It certainly is the hope of the framers of the Act that these ideals have been achieved

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This digest, which has been compiled by the Editor, covers the period from July 1, 1957, to September 30, 1957.

UNITED KINGDOM

AGRICULTURE

See GOVERNMENT FUNCTIONS AND APPOINTMENTS, **Ministers' functions** (below, p. 356).

COMPULSORY PURCHASE

Validity of order

Statutory purpose. The plaintiffs, who were the personal representatives of Mrs. K., claimed against the defendant corporation (*inter alia*) a declaration that a notice to treat dated January 4, 1939, was of no validity or legal effect. Mrs. K. had carried on the business of poulterer and fishmonger at her premises, No. 19 H. Street, Dudley. In 1937 the defendants proposed to develop an island site within the borough. It was proposed (*inter alia*) to erect a market hall and to widen H. Street. The area of development included No. 19 H. Street. A compulsory purchase order was made in 1937, which was confirmed by the Minister in December, 1938, after a public inquiry had been held. On January 5, 1939, the defendants served a notice to treat dated January 4, 1939, on Mrs. K. in respect of No. 19 H. Street. Compensation was agreed. Mrs. K. submitted a draft contract, but in view of the war the matter did not proceed further at that time. In July, 1951, the defendants resolved to acquire the properties (which included No. 19 H. Street) under a new development plan, which showed that the defendants' views on the development of the island site had substantially changed. There was to be no widening of H. Street and no erection of a market hall, but No. 19 H. Street was now required for the provision of a large car park. The issue arose whether the plaintiffs' premises were to be acquired under a new scheme at present-day prices or whether they were to be acquired under the existing notice to treat which would result in the premises being valued as at the date of that notice. *Held*, the original scheme for which the powers of compulsory purchase were sought was dead, and the present proposals for which the corporation now sought to exercise its compulsory powers were quite different; in these circumstances the corporation should seek to acquire the property under a new scheme: GRICE *v.* DUDLEY CORPORATION [1957] 3 W.L.R. 314; [1957] 2 All E.R. 673, Upjohn J.

COURTS

Administration of Justice

Statutory amendment. An Order has been made fixing October 1, 1957, as the date of commencement of section 15 of the Administration of Justice Act, 1956, which is the only provision of the Act not already in force (S.I. 1957 No. 1179).

Judicial salaries and pensions

Recorders of Liverpool and Manchester, county court judges, metropolitan *magistrates.* The Judicial Offices (Salaries and Pensions) Act, 1957 (5 & 6 Eliz. 2, c. 46), received the Royal Assent on July 17, 1957. It increases the salaries of these recorders, judges and magistrates to £4,500 p.a., £3,750 p.a. and £3,400 p.a. respectively and makes minor provisions for pensions.

Privy Council Appeals

Ghana. Orders in Council have been made regulating appeals from the Court of Appeal of Ghana to H.M. in Council (S.I. 1957 No. 1361) and omitting Ghana from the territories to which the West African (Appeal to Privy Council) Order in Council, 1949, applies (S.I. 1957 No. 1362).

Statistics

Civil judicial. Statistics have been published for 1956 relating to the Judicial Committee of the Privy Council, the House of Lords, the Supreme Court of Judicature, county courts and other civil courts in England and Wales (Cmnd. 224).

Statistics have been published for 1956 relating to the House of Lords (Scottish Appeals), the Court of Session, Sheriff Courts and other civil courts, Licensing Courts, certain legal and public Departments, bankruptcy, court fees and fees taken in the Departments, in Scotland (Cmnd. 215).

CROWN LIABILITY

Authorised Departments

A new list of Authorised Government Departments and the names and addresses for service of the person who is, or is acting for the purposes of the Act as, solicitor for such Departments, has been published by the Treasury in pursuance of section 17 of the Crown Proceedings Act, 1947. This list, which is dated September 1, 1957, supersedes the list published on May 1, 1954.

EDUCATION

Independent schools

Registration. An Order has been made exempting from registration all schools which have been recognised as efficient by the Minister (S.I. 1957 No. 1173; see also above, p. 253).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS, **Ministers' Functions** (below, p. 356).

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Central Land Board

Report for 1956–1957 has been published (H.C. 248 of 1956–1957).

Civil Service

Recruitment. A Statement of Government policy and a Report by the Civil Service Commission have been published on recruitment to the Administrative Class of the Home Civil Service and the Senior Branch of the Foreign Service.

The Statement announces the decision to continue both Method I and Method II for selection to the Administrative Class but that normally not more than half of the vacancies in any one competition will be allotted to candidates by Method II. It also states that for the next five years, as a trial, Method I will be re-introduced for the Foreign Service and not more than three-quarters of the vacancies will, for this period, be allotted to candidates by Method II.

The Report reviews and analyses the experience of selection during the last ten years (Cmnd. 232).

Report. The 91st Report, for 1956–1957, of the Civil Service Commissioners has been published by the Commission (H.M.S.O. 25–1–0–57).

Company holdings

The Chancellor of the Exchequer circulated in the Official Report a list of Government holdings of shares in public companies. The companies (other than those iron and steel companies in which the Iron and Steel Holding and Realisation Agency held securities) were: Suez Canal Company, Cable and Wireless, Ltd., British Petroleum Co., Ltd., Cunard Steamship Co., Ltd., British Sugar Corporation, Itabina Iron Ore Co., Ltd. (in liquidation), S.B. (Realisations), Ltd. (for details see 572 H.C. Deb. 871–872; July 2, 1957).

Fishing industry

Inquiry. The Minister of Agriculture, Fisheries and Food stated that the Government proposed to appoint a Committee of Inquiry into the future of the fishing industry, taking account of present and prospective developments affecting the fishing fleets, fish processing and marketing. The composition and terms of reference of the Committee would be announced later (573 H.C. Deb. 759–761; July 15, 1957).

Inspectorate

Explosives. The 81st Report, for 1956, of H.M.'s Inspectors of Explosives has been published (H.C. 220 of 1956–1957).

Fire. The Report for 1956 of H.M.'s Chief Inspector of Fire Services (Counties and County Boroughs, England and Wales) has been published (Cmnd. 246).

Police. The Report for 1955–1956 of H.M.'s Inspectors of Constabulary in England and Wales has been published (H.C. 210 of 1956–1957).

Ministers' Functions

Agriculture, Food and Fisheries. Regulations have been made bringing to an end the delegation to County Agricultural Executive Committees of certain functions of the Minister relating to pest control, field drainage, supply of water, and hill farming (S.I. 1957 No. 1602).

Attorney-General's fiat. On August 1, 1957, the House of Commons debated a motion (which was negatived) regretting the execution of John Willson Vickers and deploring the failure of the Attorney-General to grant his fiat to enable Vickers to bring a further appeal to the House of Lords (574 H.C. Deb. 1623–1655).

Education. The Report of the Ministry for 1956 and the statistics of public education for England and Wales have been published (Cmnd. 223).

Labour and National Service. The Report of the Ministry for 1956 has been published (Cmnd. 242).

Pensions and National Insurance. The Report of the Ministry for 1956 has been published (Cmnd. 229).

Ministers' Salaries

The Ministerial Salaries Act, 1957 (5 & 6 Eliz. 2, c. 47), received the Royal Assent on July 17, 1957. As a consequence of this Act and the new provisions for Members' salaries (see below, p. 368), the new Ministerial salaries are: Prime Minister £10,000; Departmental Ministers £5,000; Ministers of State, Chief Government Whip, Financial and Economic Secretaries to the Treasury £3,750; Parliamentary Secretaries £2,500; Deputy Chief Whip (Commons) £2,200; Whips (Commons) £2,000. All these also receive £750 as Members of Parliament (the figure had previously been £500 except for the Prime Minister and Departmental Ministers who had received nothing of their salaries as M.P.s). The Chief Whip and Deputy Chief Whip in the House of Lords are to receive £2,200 and other Whips in the House of Lords £2,000. (572 H.C. Deb. 1316–1322, July 4, 1957; 204 H.L. Deb. 662–664, July 4, 1957; 573 H.C. Deb. 229–251, July 9, 1957.)

New Towns

Reports of the Cumbernauld, East Kilbride, and Glenrothes Development Corporations for 1956–1957 have been published (H.C. 238 of 1956–1957).

See also LOCAL GOVERNMENT, **Reorganisation,** *Debate* (below, p. 360); PARLIAMENT, **Public Accounts Committee (House of Commons)** (below, p. 369).

Public Works Loan Board

Report for 1956–1957 has been published by the Treasury (H.M.S.O. 63–36–0–57).

Research

Department of Scientific and Industrial Research. The Report of the Fire Research Board and its Director, for 1956 (H.M.S.O. 47–151–0–56), the Food Investigation Board and its Director, for 1956 (H.M.S.O. 47–7–0–56) and the Fuel Research Board and its Director, for 1956 (H.M.S.O. 47–10–0–56) have been published.

The Department has also published a review of scientific research in British Universities, 1956–1957 (H.M.S.O. 47–174–9–57).

The Report of the Department for 1955–1956 has been published (Cmnd. 213).

See also PARLIAMENT, **Public Accounts Committee (House of Commons)** (below, p. 369).

HOUSING

Consolidation

Housing Act, 1957 (*5 & 6 Eliz. 2, c. 56*) received the Royal Assent on July 31, 1957. The Act consolidates the Housing Act, 1936, the Housing (Financial and Miscellaneous Provisions) Act, 1946, the Housing Act, 1949, the Housing Act, 1952, the Local Government (Miscellaneous Provisions) Act, 1953, the Housing Repairs and Rents Act, 1954, and the Slum Clearance (Compensation) Act, 1956, in so far as they relate to housing with the exception of certain provisions relating to financial matters.

In addition, certain provisions are incorporated from the Public Health Act, 1875, the Housing (Financial Provisions) Act, 1924, the Housing (Rural Authorities) Act, 1931, the Housing Act, 1930, the Housing (Financial Provisions) Act, 1938, the Local Authorities Loans Act, 1945, the Acquisition of Land (Authorisation Procedure) Act, 1946, the New Towns Act, 1946, the Industrial and Provident Societies Act, 1952, and the Housing Subsidies Act, 1956.

The Act came into force on September 1, 1957.

The Act does not apply to Scotland or Northern Ireland.

The Ministry of Housing and Local Government has issued a short circular on the Act (Circular No. 46/57).

Procedure for proposals

The Ministry of Housing and Local Government has issued a circular containing a new procedure by which local housing authorities are to submit proposals for housing tenders, loan sanctions, etc., to the Ministry. A new series of standard forms is provided in the Appendix (Circular No. 48/57).

INQUIRIES

Transport

Air. The Report has been published of the court investigation of the accident to Hermes G–ALDJ on November 5, 1956, at Blackbushe Airport. The Report is dated March 7, 1957 (C.A.P. 144).

Railway. The Report has been published on the collision which occurred on November 22, 1956, at Newlay and Horsforth in the North Eastern Region. The Report is dated April 9, 1957.

The Report has been published on the derailment which occurred on November 22, 1956, between Brookwood and Farnborough in the Southern Region. The Report is dated April 17, 1957.

The Report has been published on the collision which occurred on January 7, 1957, near Welwyn Garden City Station in the Eastern Region. The Report is dated June 21, 1957.

The Report has been published on the derailment which occurred on November 22, 1956, at Droylsden Station in the London Midland Region. The Report is dated May 1, 1957.

The Report has been published on the collision which occurred on February 19, 1957, near Leicester Central Station in the London Midland Region. The Report is dated June 6, 1957.

LOCAL GOVERNMENT

Finance

Borrowing. The rates of interest chargeable on loans advanced from the Local Loans Fund from July 13, 1957, were increased to 5¾ per cent. for loans for not more than five years, to 6 per cent. for those for more than five but not more than fifteen years, and to 5¾ per cent. for those for more than fifteen years (S.I. 1957 No. 1237, revoking S.I. 1957 No. 230; and see above p. 159). The rates were further increased, from September 28, 1957, to 7¼ per cent. for loans for not more than five years and to 6¾ per cent. for longer periods (S.I. 1957 No. 1712, revoking S.I. 1957 No. 1237).

Rating and valuation. The following decisions have been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *Chartered Insurance Institute* v. *London Corporation* [1957] 1 W.L.R. 867; [1957] 2 All E.R. 638, D.C.; *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council* [1957] 1 W.L.R. 941; [1957] 2 All E.R. 791; *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199 C.A.; *National and Local Government Officers Association* v. *Bournemouth County B.C.* (1957) 50 R. & I.T. 487; *Guinness Trust* (*London Fund*) v. *West Ham County B.C.* (1957) 50 R. & I.T. 465; *Parkstone Yacht Club* v. *Poole B.C.* (1957) R. & I.T. 509; *Gravesend Cricket, Tennis & Bowls Co.* v. *Gravesend B.C.; Mid-Kent Golf Club* v. *Same* (1957) 50 R. & I.T. 613.

On position of refreshment pavilion in a public park see *Sheffield Corporation* v. *Tranter* [1957] 1 W.L.R. 843; [1957] 2 All E.R. 583, C.A.

On interpretation of Burial Act, 1852, s. 26; Burial Act, 1855, s. 15; Cremation Act, 1902, s. 4, see *Law* v. *Wandsworth B.C., Parkin* v. *Camberwell B.C.* [1957] 3 W.L.R. 490; [1957] 3 All E.R. 71, C.A.

On interpretation of Rating and Valuation (Apportionment) Act, 1928, s. 3, see *Meridew Rural District Council* v. *Standard Motor Co., Paver* v. *Standard Motor Co.* [1957] 1 W.L.R. 958; [1957] 3 All E.R. 222, C.A.; *London Transport Executive* v. *Betts* [1957] 3 All E.R. 126, C.A.

The Ministry of Housing and Local Government has published Rates and Rateable Values, England and Wales, 1956–1957 (H.M.S.O. 75–3–0–57).

Review. The Government proposals for the reform of local government finance are contained in two White Papers, for England and Wales (Cmnd. 209) and for Scotland (Cmnd. 208).

For England and Wales, it is proposed in the White Paper that industry and freight transport, at present rated at 25 per cent. of their net annual value, shall be re-rated to 50 per cent.; and that corresponding alterations shall be made as regards industrial properties occupied by the Crown. The payments made by the nationalised gas, electricity and transport undertakings will all be included in the rating system. Electricity properties will be rated on lines similar to those operating for gas; electricity and gas showrooms used as shops will be separately and directly assessed to rates; and the transport payments distributed by the Ministry of Housing and Local Government will all be made to the rating authorities (the councils of county boroughs, non-county boroughs, urban and rural districts) and not partly to the county councils as at present. It is further proposed that the rating authorities should extend their arrangements for rate paying by instalments (*i.e.*, at weekly or monthly intervals), in order to ease the position for those ratepayers at present faced with half-yearly demand for rates. Every local authority should consider how best to convey to the ratepayers in its area, and particularly to those who pay rates with their rent and may therefore be ill-informed about the details of local finance, the purpose and cost of local government.

It is suggested in the White Paper that the percentage grants to be absorbed into the general grant should be: education (but not school milk or meals); agricultural education; health services under the National Health Service Act, 1946; fire services; child care; town planning (but not grants for the re-development of war-damaged areas); road safety schemes; traffic patrols; registration of electors; schemes for physical training and recreational facilities; provision of residential and temporary accommodation under the National Assistance Act, 1948; and school crossing patrols. The expenditure for advanced technological education and a wide range of further education will be pooled and shared between all local education authorities. At their present level, the grants specifically allocated to the above services total nearly £300 million; when they have been absorbed, grants which are general rather than specific in character will rise from one-sixth to nearly two-thirds of all Exchequer assistance. It is stressed in the White Paper that this will assure a greater measure of local financial independence, and that, although the Government must still remain responsible for laying down national policy and for ensuring compliance with basic standards in the several services which are grant-aided, the maximum local discretion will be given in the method of providing the services, and the reward of efficiency will accrue wholly to the benefit of the local population. Initially, the amount of the general grant will be fixed for two years in advance; but the Government are aware that the services concerned are not static, and should factors beyond the control of local authorities and occurring generally throughout England and Wales materially affect the demands on the local authorities in respect of any of the services, an interim revision of the grant could be made.

It is stated in the White Paper that while re-rating increases the product of rates, it has the direct effect of reducing the product of income tax, profits tax and surtax. It is therefore proposed that some reduction of grants (the proportion of which to the rates is already as six is to five and is still increasing) should accompany the re-rating. The estimated product of re-rating is of the order of £30 million a year, of which about half will be at the expense of the Exchequer. In view of the difficulties of the transition from specific grants to the general grant, the Government propose that the greater part of the net increase of £15 million should accrue to the local authorities. The proposed reduction in grants therefore will be limited to £20 million a year, leaving the local authorities with a gain, on present estimates, of £10 million annually. It is suggested that the reduction should be effected partly by a smaller distribution of rate deficiency grant, partly by the abolition of sundry small separate grants which should no longer be necessary, and partly by reduction in the total of general grants.

All these changes may ultimately entail gains and losses for individual rating areas, but, on the whole, the number of areas which gain will be larger than the number which lose; and transitional arrangements will be made to ensure that both gains and losses take effect gradually, so that the necessary adjustments may be made.

All the changes will be designed to come into force together from April 1,

1959. (This summary is based on Commonwealth Survey, C.O.I., July 23, 1957.)

The general principles set out in the White Paper for England and Wales apply also to Scotland and the White Paper for Scotland is limited to the special features of the Government's proposals in their application to Scotland.

For a debate on these two White Papers, see 574 H.C. Deb. 912–1026, 1081–1208, July 29 and 30, 1957.

Parish councils

Powers. The Parish Councils Act, 1957 (5 & 6 Eliz. 2, c. 42), received the Royal Assent on July 17, 1957. The Act empowers parish councils (or, sometimes, parish meetings) to provide seats and shelters in roads, public clocks, to light roads and public places, to provide parking places for bicycles and motor cycles; it provides that parish councils shall in all cases be local authorities for the purposes of the Open Spaces Act, 1906, and that county council approval is not necessary in certain circumstances including the raising of loans; and it amends the Local Government Act, 1933, s. 50 (1), by providing that the maximum number of parish councillors shall be increased from 15 to 21.

The Ministry of Housing and Local Government has issued a circular on the Act (Circular No. 49/57).

Police

Inquiry. The Report of the inquiry into the administration and efficiency of the Cardiganshire constabulary and the state of discipline in the force has been published (Cmnd. 251).

Metropolis. The Report of the Commissioner of Police of the Metropolis, for 1956, has been published (Cmnd. 222).

Reorganisation

Debate. On July 29 and 30, 1957, the House of Commons debated the White Papers relating to Areas, Status and Functions of Local Authorities in England and Wales (Cmd. 9831; see [1956] P.L. 377) and Functions of County and County District Councils (Cmnd. 161; see above pp. 258–259). In the course of this debate, the Minister of Housing and Local Government stated (1) that he proposed to withdraw the stipulation that in conurbations the figure for county borough status should be 125,000 instead of 100,000 as elsewhere; (2) that a Royal Commission would be appointed to examine the present structure and working of local government in the Greater London area and to make recommendations; (3) that on some functions—weights and measures for example—the Government now thought that responsibility should be directly conferred upon large district councils instead of being delegated; and that the proposals in the White Paper on Functions, relating to classified roads and food and drugs would probably not be proceeded with; (4) that a new agency would be created to take over the property and liabilities of the new town development corporations as they were wound up (574 H.C. Deb. 912–1026, 1081–1208).

See also COMPULSORY PURCHASE (above, p. 354); GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 355); HOUSING (above, p. 357); NATIONAL HEALTH SERVICE, **Ambulance services** (below, p. 362); PUBLIC HEALTH (below, p. 370); TOWN AND COUNTRY PLANNING (below, p. 370).

MONOPOLIES AND RESTRICTIVE PRACTICES

Restrictive Practices Court

Direction. It was announced on September 3, 1957, that the Registrar had been directed by the Board of Trade to refer to the Restrictive Practices Court a number of registered agreements, including agreements in relation to the supply of agricultural machinery and parts, copper wire rods (not rolled), electrical fractional horse power motors, electrical transformers, electronic valves (including cathode ray tubes), portable pneumatic power tools and typewriters.

This direction is the second made by the Board of Trade, and its effect is to place the cases it covers on the same footing as those included in the first direction, made on April 15, 1957 (see above p. 259).

The two directions covered nearly 200 registered agreements affecting commodities and processes. As it was impracticable to start proceedings immediately in respect of all of them, the Registrar had selected, for each commodity, those agreements which appeared to be most important, or typical, and notices of reference, which mark the formal commencement of proceedings, had already been issued in respect of twenty agreements. These related to all the commodities in the first direction, except shell boilers and school milk. The parties to the registered agreement about shell boilers had notified the Registrar that it had been terminated; and agreements about school milk were the subject of inquiries (see Commonwealth Survey, C.O.I, September 17, 1957).

Practice Direction. The President has directed: all applications in England and Wales for representation orders that the members of a trade association shall be represented by the association shall until further order be dealt with by the clerk of the court who may at his discretion either dispose of the same or adjourn them to the judge [1957] 1 W.L.R. 931.

Restrictive trading agreements

Whether registrable. A company which carried on the business of manufacturing motor-cars had until 1957 a sales organisation consisting of the appointment of distributors, dealers, retail dealers, etc., all of whom entered into annual written agreements with the company binding them to purchase a certain number of the company's cars and fixing the price and discount at which they should be sold. Some of the agreements were bipartite, *e.g.*, between the company and a distributor, some tripartite, *e.g.*, between the company, a distributor and a dealer, and some even quadripartite, *e.g.*, between the company, a distributor, a dealer and a retail dealer. On the coming into force of the Restrictive Trade Practices Act, 1956, the company took steps by which they purported to turn every multilateral agreement into a bilateral agreement, it being intended that the new agreements, being bipartite agreements, should satisfy the conditions contained in section 8 (3) of the Act. An application was made to the High Court on behalf of the company by summons under section 13 (2) of the Act, in which a declaration was sought that none of these bipartite agreements was a registrable agreement or arrangement within the meaning of the Act. On behalf of the registrar it was contended that until the attempted change in 1956 the basis of the company's method of selling cars was by a series of multipartite agreements with its dealers; that there was no evidence of any desire on the part of the company to make any change in the way business was done; that the commercial efficiency of the whole selling organisation depended on the existence of these parallel agreements, and that, looking at the whole pattern of the arrangement, it involved an acknowledgment on the part of each agent of the terms of the agreement by which every other agent was bound. *Held,* that the court could only take the new agreements as they stood; that they contained the whole of the arrangements between the parties, no further or collateral arrangement being alleged; and that, on their true construction, they were excepted from the operation of Part I of the Act and were not subject to registration: *Re* AUSTIN MOTOR-CAR CO.'S AGREEMENTS [1957] 3 W.L.R. 450; [1957] 3 All E.R. 62, Upjohn J.

NATIONAL HEALTH SERVICE

Ambulance services

Statutory amendment. The National Health Service (Amendment) Act, 1957 (5 & 6 Eliz. 2, c. 44), received the Royal Assent on July 17, 1957. The Act empowers local health authorities to make ambulances or other means of transport available, for reward, for the purposes of conveying persons suffering from illness in the area of the authority to places in or outside their area, in circumstances in which they are not, by virtue of section 27 (1), of the National Health Service Act, 1946.

Contributions

Statutory amendment. The National Health Service Contributions Act, 1957 (5 & 6 Eliz. 2, c. 34), received the Royal Assent on July 17, 1957, and came fully into force on September 2, 1957 (S.I. 1957 No. 1326).

This Act provides for increases in the National Health Service elements in existing National Insurance contributions; for the amounts so increased to be established as separate National Health Service contributions; for consequential adjustments to be made in the rates of National Insurance contributions; and for the National Health Service contributions to be collected in conjunction with the National Insurance contributions.

Section 1 provides for the separate establishment of National Health Service contributions, to be paid by all who pay, or are liable to pay, National Insurance contributions. The new rates of National Health Service contributions are set out in Schedule I. These contributions will be collected by the Minister of Pensions and National Insurance and paid over by him, after deducting the cost of collection, to the Minister of Health and the Secretary of State for Scotland (s. 1 (4)). Section 2 provides for consequential reductions in the rates of National Insurance contributions. The new rates of National Insurance contributions are set out in Schedule III. Section 3 contains supplementary provisions. Section 4 contains financial provisions. Section 5 provides for corresponding legislation in Northern Ireland. Section 6 is the interpretation section.

Regulations have been made exempting employers of mariners from payment of contributions where the mariners are not domiciled or resident in the United Kingdom, and are employed on British foreign-going ships (S.I. 1957 No. 1327).

Scotland

Debate. On July 24, 1957, the House of Commons in Committee of Supply debated the health services in Scotland (574 H.C. Deb. 424–537).

See also PARLIAMENT, **Public Accounts Committee (House of Commons)** (below, p. 369); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS, **Disciplinary bodies** (below, p. 371).

NATIONAL INSURANCE

Benefits

Annulled Marriages. Regulations have been made providing that for certain purposes voidable marriages which have been annulled shall be treated as valid marriages which have been terminated by divorce (S.I. 1957 No. 1392). The National Insurance Advisory Committee approved the draft without amendment (H.C. 253 of 1956–1957).

Norway. A convention on social security between Great Britain and Norway has been agreed. Ratifications have not yet been exchanged (Cmnd. 252).

Retirement pensions. On August 1, 1957, the House of Commons debated retirement pensions (574 H.C. Deb. 1579–1622).

Regulations have been made providing for certain matters relating to the payment of retirement pensions and home confinement grants (S.I. 1957 No. 1357). The N.I.A.C. approved the draft without amendment (H.C. 247 of 1956–1957).

Regulations have been made providing for certain matters where husband and wife are both entitled to retirement pensions (S.I. 1957 No. 1340). The N.I.A.C. approved the draft without amendment (H.C. 246 of 1956–1957). And see *Widow's benefits,* below.

Statutory amendment. An Order has been made bringing into effect the National Insurance Act, 1957, as follows: sections 1, 2 (1) (2) (3), 4, 8, 9 (1) (*b*) on August 5, 1957; sections 2 (4), 9 (1) (*c*) on September 2, 1957 (S.I. 1957 No. 1287).

Unemployment and sickness benefit. Regulations have been made amending S.I. 1948 No. 1277 (S.I. 1957 No. 1319). The N.I.A.C. approved the draft without amendment (H.C. 244 of 1956–1957).

Widow's benefits. Provisional regulations have been made providing for the disregarding of disqualifications for benefit for the purposes of certain provisions of the National Insurance Act, 1957 (S.I. 1957 No. 1298).

Provisional regulations have been made amending S.I. 1955 No. 493 (S.I. 1957 No. 1301).

Regulations have been made amending S.I. 1948 No. 1261 (S.I. 1957 No. 1309). The N.I.A.C. approved the draft without amendment (H.C. 239 of 1956–1957). (This also affects retirement pensions.) Regulations have been made amending S.I. 1948 No. 55 (S.I. 1957 No. 1333). (This also affects retirement pensions.)

Regulations have been made amending S.I. 1948 No. 612 (S.I. 1957 No. 1332). (This also affects retirement pensions.)

Contributions

Married Women. Regulations have been made amending S.I. 1948 No. 1470 (S.I. 1957 No. 1322). The N.I.A.C. approved the draft (H.C. 201 of 1956–1957).

Miscellaneous. Regulations have been made amending S.I. 1948 No. 1417 (S.I. 1957 No. 1299). The N.I.A.C. approved the draft (H.C. 237 of 1956–1957).

Residence and persons abroad. Regulations have been made amending S.I. 1948 No. 1275 (S.I. 1957 No. 1300). The N.I.A.C. approved the draft (H.C. 237 of 1956–1957).

See also NATIONAL HEALTH SERVICE, **Contributions,** *Statutory Amendment* (above, p. 362).

Decisions of the Commissioner and the Tribunal

"Being treated." By S.I. 1948 No. 1275, regulation 7 (1), a person is not disqualified for receiving sickness benefit "(*b*) by reason of being temporarily absent from Great Britain . . . for the specific purpose of being treated for incapacity which commenced before he left Great Britain."

Claimant suffered from asthma and bronchitis. On medical advice he made arrangements for a vacation in Australia. Before the sailing date he entered hospital, but was allowed to sail on condition he was treated by the ship's doctor. On arrival in Australia he continued to receive medical treatment. His return to Great Britain was delayed by his state of health. *Held,* that his absence was for the purpose of being treated in a beneficial climate. His original intention to go for a vacation in a warm climate, even though on his doctor's advice, would not have been for the purpose of "being treated" but the situation was altered by the worsening of his condition and need for treatment: Decision No. R(S) 1/57.

"*Day of unemployment.*" By S.I. 1948 No. 1277, regulation 6 (1) (*d*), a day is not a day of unemployment "if it is a day in respect of which a person, notwithstanding that his employment has terminated, continues to receive wages or receives any payment by way of compensation for the loss of the remuneration which he would have received."

On dismissal, the branch manager of an assurance society was offered and accepted twelve monthly payments equivalent to his basic salary, subject to certain conditions. Under his contract of service he was entitled to one month's notice. *Held,* that the claimant received compensation for loss of remuneration in respect of one month from the date of termination of the employment and that the days in that period could not be treated as days of unemployment: Decision No. R(U) 9/57.

"*Following an occupation.*" By S.I. 1948 No. 1277, regulation 6 (1) (*h*), as amended, a claimant for unemployment benefit must not be following an occupation except one by which he earns not more than 6s. 8d. a day.

Claimant had a grocery business which was managed by his wife who received a weekly wage of £3. He himself was employed full-time elsewhere and took no part in the business except to prepare the yearly accounts. *Held,* that the extent of the claimant's personal activity in the business was too slight for it to be said that he was following the occupation of grocer. Alternatively, an apportionment of the profit between the claimant and his wife by reference to the extent of their respective duties did not show him to be earning 6s. 8d. a day: Decision No. R(U) 11/57.

"*Residing with.*" A voluntary mental patient had been in hospital for nearly six years. It was not expected that he would be discharged in the near future. In the last two and a half years he had been allowed to return home approximately every other week-end and for a longer period in the summer and at Christmas. *Held,* that the claimant had ceased to reside with his wife. The pattern of his visits home showed that he was residing in hospital. R(S) 14/55 compared: Decision No. R(S) 2/57.

Review. Claimant's husband disappeared in 1951. His hat and jacket were found at a landing stage at a port. The local tribunal decided, ten months later, there was insufficient evidence to justify a finding that he was dead. In 1956 claimant applied for a review. *Held,* that the original decision was based on a mistake as to the material facts and should be reviewed. The claimant had established that on the balance of probability her husband was dead and that he died on the day he disappeared: Decision No. R(G) 4/57.

Part-time employment

Report of the N.I.A.C. on part-time employment has been published (Cmnd. 206).

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Benefits

Norway. See above, p. 362.

Decisions of the Commissioner and the Tribunal

Accident. Deceased, an attendant at a hospital, collapsed while washing up and died two days later from a dissecting aortic aneurysm. *Held,* that death was not due to an industrial accident. The start of a dissecting aneurysm would have given rise to immediate pain. A rise in blood pressure caused by physical effort would have been transitory and if this were to start the rupture the effect would have been felt at once. The pain occurred while washing up, and there is nothing to justify holding that there was any effort involved which would have caused the rupture: Decision No. R(I) 21/57.

"*Out of and in the course of employment.*" A meter collector kept his books and equipment at home but had to visit his employers' office daily for instructions. Each morning he went direct from home to the first house he chose to visit. He was injured on such a visit. *Held,* that the injury was not caused by accident arising out of and in the course of employment. The office, not his home, was his base and the claimant's employment did not commence until he reached the first house to be visited. The law as it affects accidents whilst travelling to work discussed: Decision No. R(I) 19/57.

Kiln worker at a gypsum mine was going to work when he slipped and fell on an icy footpath belonging to his employers. *Held,* that the accident was not an industrial accident. The path was open to the general public and the claimant was subject to no greater risk than the general public. The Commissioner discusses this question in the light of various decisions: Decision No. R(I) 20/57.

Finance

Accounts. The Sixth Interim Report, for 1955–1956, by the Government Actuary has been published (H.C. 203 of 1956–1957).

Review

Error of law. Fingers are an "organ of the body" within the meaning of regulation 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, which provide that injuries are to be aggregated together to find the total disability from which the claimant has suffered: "Where as a result of the relevant accident a claimant has suffered an injury to an organ of his body which in a person whose physical condition is normal would be one of two similar organs, the functions of which would be interchangeable or complementary . . ."

The claimant, who had sustained a disabling injury to two fingers of his left hand while subject to disability due to a previous injury to a finger of his right hand, moved for certiorari to quash a decision of the Medical Appeal Tribunal that the old injury to the right hand was not to be taken into account in determining his disability benefit for the injury to the left hand. *Held,* fingers were part of an organ, the organ being the hand, and hands were complementary organs; therefore, the medical tribunal were in error and the motion succeeded: R. *v.* MEDICAL APPEAL TRIBUNAL, *ex p.* BURPITT [1957] 3 W.L.R. 447; [1957] 2 All E.R. 704, D.C.

NATIONALISED INDUSTRIES

General

Salaries. The Prime Minister stated that salaries of members of nationalised industries had been adjusted. The changes would be reported to Parliament in detail in due course but, as an example, the maximum salary of the chairman of a major board would be raised from £8,500 to £10,000 and of a member of such a board from £5,000 to £7,000 (572 H.C. Deb. 1318, July 4, 1957). And see **Gas** below, p. 367.

Airways

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by the British European Airways Corporation (H.C. 223 of 1956–1957) and the British Overseas Airways Corporation (H.C. 224 of 1956–1957).

Reports. The Reports and Accounts for 1956–1957 of the British European

Airways Corporation (H.C. 251 of 1956–1957) and the British Overseas Airways Corporation (H.C. 252 of 1956–1957) have been published.

The Report for 1956–1957, with a Statement by the Minister, of the Air Transport Advisory Council has been published (H.C. 233 of 1956–1957).

Atomic Energy

Report. The Third Annual Report, for 1956–1957, of the United Kingdom Atomic Energy Authority has been published (H.C. 219 of 1956–1957).

Coal

Consumers. The Reports for 1956–1957, of the Industrial and Domestic Coal Consumers' Councils have been published (H.C. 218 of 1956–1957).

Electricity

Guarantees. The Treasury issued statements of guarantees on loans proposed to be raised by the Central Electricity Authority (H.C. 225 of 1956–1957), the North of Scotland Hydro-Electric Board (H.C. 227 of 1956–1957) and the South of Scotland Electricity Board (H.C. 228 of 1956–1957).

Reorganisation. The Electricity Act, 1957 (5 & 6 Eliz. 2, c. 48), received the Royal Assent on July 17, 1957.

The principal object of this Act is to provide for the dissolution of the Central Electricity Authority, the establishment of a new Central Electricity Generating Board and a new Electricity Council, and for the transfer of the Authority's functions to the Generating Board or Electricity Council or to the Minister of Power.

The Central Electricity Authority will cease to exist on January 1, 1958 (s. 1). Section 2 provides for the establishment, constitution and functions of the Central Electricity Generating Board, and section 3 makes corresponding provision for the Electricity Council. The chairman of the Generating Board or Electricity Council must be a whole-time member of the body; but other members of the Generating Board or Electricity Council and members of Area Boards may be appointed as whole-time or part-time members (s. 4). Section 5 makes new provision as to Consultative Councils.

Provision is made for the generation of electricity by Area Boards, with ministerial approval (s. 6) and for research (s. 7).

Section 8 empowers the Minister to give directions to the Electricity Council and to any of the Electricity Boards in England and Wales, requires his approval for major measures of reorganisation and development, and requires returns, accounts and other information to be furnished to him. Section 9 provides for representations by Electricity Boards in England and Wales to the Electricity Council, who may give advice or make further representations to the Minister. Section 10 requires annual reports by each Board and by the Electricity Council, copies of which are to be laid before Parliament; and the Council is to prepare annual consolidated statements of account which, together with the auditors' reports upon them, are also to be laid before Parliament (s. 11). Section 12 requires the Electricity Council and the Scottish Electricity Boards to seek joint consultation with employees' organisations with a view to establishing and maintaining agreed machinery for settling terms and conditions of employment.

The Generating Board and Area Boards are given the general duty of balancing their revenue accounts, taking one year with another (s. 13). Section 14 contains new provisions about tariffs and special agreements with consumers, including provision for references to Consultative Councils and the Electricity Council. The Electricity Council, Generating Board and Area Boards may borrow money (with Ministerial approval and Treasury consent) in accordance with section 15. Section 16 provides for the issue of stock by the Council and by the Generating and Area Boards; and the Treasury may guarantee the redemption or repayment of, and the payment of interest on, British Electricity Stock and temporary loans raised by the Council or any Board (s. 17). Section 18 provides for periodical estimates of the Boards' financial requirements and for the allocation to them of liabilities in respect of British Electricity Stock issued by the Council. Section 19 requires the Council to establish and maintain a central guarantee fund, to which the Boards are to make annual contributions. The Generating and Area Boards are all to establish and maintain reserve funds (s. 20). The Council may require the Electricity Boards in England and Wales to contribute to its expenses (s. 21). Section 22 provides for the application of any annual surpluses of Electricity Boards in England and Wales. Section 23 deals with the continued payment of compensation to local authorities in respect of former municipal undertakings. Section 24 contains special provisions as to income tax and profits tax.

The assets and liabilities of the Authority are to be transferred to the Council and Generating Board on January 1, 1958 (ss. 25, 26), and compensation is to be paid to any officers of the Authority or Area Boards who are displaced or otherwise affected by the change (s. 27).

There are various miscellaneous and supplementary provisions (ss. 28–42) and five schedules. The Act extends to Scotland, subject to certain exceptions, but not to Northern Ireland.

Regulations have been made governing the terms of appointment and tenure of office of the Electricity Council, the Generating Board and Area Boards (S.I. 1957 No. 1382).

For names of those first appointed to the Council and the Board, see 574 H.C. Deb. *259*, August 1, 1957.

Reports. The Annual Reports and Accounts for 1956–1957 of the Central Authority (H.C. 257 of 1956–1957), the Area Boards (with reports from the consultative councils) (H.C. 258–269) have been published as has also the report of the Minister of Power (H.C. 284 of 1956–1957).

Gas

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 226 of 1956–1957).

Salaries. The Minister of Power has stated that the following salaries are payable as from July 1, 1957: Gas Council: Chairman £8,500, Deputy Chairman £7,500; Area Board: Chairman £6,500, Deputy Chairman £5,000, Full-time Member £4,000, Part-time Member £1,000; Consultative Council: Chairman £1,500 (H.C. 282 of 1956–1957).

Transport

Charges scheme. The Transport Tribunal confirmed the British Transport Commission (Passenger) Charges Scheme, 1957, on August 8, 1957 (H.M.S.O. 88–100).

Debate. On July 10, 1957, the House of Commons debated the annual report, statement of accounts and statistics of the British Transport Commission for 1956 (see above, p. 269) (573 H.C. Deb. 384–507).

Guarantee. The Treasury issued a statement of guarantee on loans proposed to be raised by the British Transport Commission (H.C. 229 of 1956–1957).

Local Act. The British Transport Commission Act, 1957, has been published (5 & 6 Eliz. 2, c. xxxiii).

Purchasing procedure. The Report on the purchasing procedure by Sir Harold Howitt has been published (Cmnd. 262).

PARLIAMENT

Broadcasting

Anticipation of debates. The Prime Minister stated that the leaders of the parties considered that the present arrangements were working satisfactorily in the spirit of the Resolution of the House of Commons of

November 30, 1955, and that the Fortnight Rule would, therefore, be left in its present state of suspense for an indefinite period (574 H.C. Deb. *91–92*, July 25, 1957; see above, p. 71).

Estimates Committee (House of Commons)

Reports. The Select Committee on Estimates issued its Fourth Report (on Customs and Excise) (H.C. 182 of 1956–1957), its Fifth Report (on Meteorological Services and the Royal Greenwich Observatory) (H.C. 199 of 1956–1957) and its Seventh Report (on Youth Employment Service and Youth Service Grants) (H.C. 240 of 1956–1957).

Members

Joint Parliamentary Under-Secretary of State for Scotland. On August 1, 1957, the House of Commons debated the motion: "That this House has taken note of the action of the Joint Parliamentary Under-Secretary of State for Scotland, the Member for Dumfries, which led to the dismissal of the Editor of the *Dumfries and Galloway Standard* and strongly deprecates such action as being inconsistent with his tenure of office as a Minister." The motion was defeated (574 H.C. Deb. 1545–1578; see also 574 H.C. Deb. 216–217, July 23, 1957; 574 H.C. Deb. 615–619, July 25, 1957; 574 H.C. Deb. 1069–1072, July 30, 1957).

Salaries. The salaries of Members of the House of Commons have been raised, from July 1, 1957, to £1,000 plus an allowance in respect of their Parliamentary expenses at the rate of £750 a year. Members of the House of Lords (except the Lord Chancellor, the Lord Chairman of Committees and any Member in receipt of a salary as the holder of a Ministerial office) may be paid expenses incurred for the purpose of attendance at sittings of the House or Committees, within a maximum of £3 3s. for each day of such attendance; this is in addition to costs of travel, for which provision already exists.

The salary of the Leader of the Opposition is raised to £3,000, of the Chairman of Ways and Means (Commons) and of Committees (Lords) to £3,250, of the Deputy Chairman of Ways and Means to £2,500; to these are added (except for Chairman of Committees (Lords)) the £750 allowance. The salary of the Speaker remains at £5,000 but he also receives the £750 allowance (572 H.C. Deb. 1316–1322, July 4, 1957; 204 H.L. Deb. 662–664, July 4, 1957; 204 H.L. Deb. 768–784, July 8, 1957; 573 H.C. Deb. 229–251, July 9, 1957).

Officers

Salaries. The Exchequer and Audit Departments Act, 1957 (5 & 6 Eliz. 2, c. 45), received the Royal Assent on July 17, 1957. It enables the salary of the Comptroller and Auditor General to be raised in future by Letters Patent on a Resolution of the House of Commons and not by Act of Parliament; and it increases the salary to £6,000 from April 1, 1956.

Procedure

Select Committees. The Select Committee on Procedure (House of Commons) has published its Second Report which deals with (1) the numbers required to form a Quorum of a Standing Committee, (2) the numbers required for the Closure in Standing Committee and (3) the Scottish Standing Committee (H.C. 211 of 1956–1957; and see above, p. 271 and [1956] P.L. 392).

The Select Committee on Procedure of the House of Lords has published its Second Report which deals with (1) re-commitment of Bills and (2) divisions in which fewer than thirty Lords have voted (H.L. (99) of 1956–1957).

Standing Orders. Amendments have been published to S.O. Nos. 11 and 106 of the House of Lords, relating to Private Bills, Provisional Order Confirmation Bills, Special Procedure Orders and Special Orders (H.L. (138) of 1956–1957).

On July 29, 1957, the House of Commons debated a motion that the House was of opinion that a statement made by the Foreign Secretary on July 22, 1957, constituted a definite matter of urgent public importance under S.O. No. 9 and regretted that the Speaker did not rule to that effect. The motion was by leave withdrawn (574 H.C. Deb. 880–911).

Public Accounts Committee (House of Commons)

Report. The Committee issued its Third Report dealing with the purchase of a country house as an approved school, non-recurrent grants to universities, pharmaceutical services, a grant in aid of the Council of Industrial Design, matters relating to aircraft (Ministry of Supply and Ministry of Transport and Civil Aviation), slaughterhouses, test-weighing of vehicles, the Department of Scientific and Industrial Research, various matters relating to the Navy, Army and Air Services Accounts, development areas, the National Land Fund Account, the New Town Acts Accounts and the Overseas Resources Development Acts Accounts (H.C. 243 of 1956–1957).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS, **Ministers' Salaries** (above, p. 356).

PUBLIC AUTHORITIES

Ancient Monuments Boards

Reports. The Third Annual Reports, for 1956, of the Boards for England, Scotland and Wales have been published (H.C. 216 of 1956–1957).

Bank of England

Report for the year ended February, 1957, has been published (Cmnd. 240).

Board of Control

Report. The Report for 1956 of the General Board of Control for Scotland has been published (Cmnd. 212).

Cinematograph Films Council

Report. The Nineteenth Report, for 1956–1957, has been published (H.C. 241 of 1956–1957).

Iron and Steel Board

Reports. The Annual Report for 1956 has been published (H.C. 215 of 1956–1957). A Special Report, 1957, on Development in the Iron and Steel Industry, has also been published (H.C. 214 of 1956–1957).

Iron and Steel Holding and Realisation Agency

Holdings. The list has been published of the nominal value of securities held by the Agency at June 30, 1957 (572 H.C. Deb. *147–150*; July 5, 1957).

Overseas Food Corporation

Dissolution. An Order has been made dissolving the Corporation on the transfer of its undertaking to the Tanganyika Agricultural Corporation, with effect from September 2, 1957 (S.I. 1957 No. 1356).

See also COMMONWEALTH AND DEPENDENT TERRITORIES, **Tanganyika** (below, p. 379).

White Fish Authority

Report. The Sixth Annual Report and Accounts, for 1956–1957, have been published (H.C. 254 of 1956–1957).

PUBLIC HEALTH

Slaughterhouses

Recommended minimum standards for the construction, lay-out and equipment of slaughterhouses in England and Wales for the purpose of securing humane slaughter and hygienic conditions have been published (Cmnd. 243).

See also PARLIAMENT, **Public Accounts Committee (House of Commons)** (above, p. 369).

SCOTLAND

See COURTS (above, p. 355); LOCAL GOVERNMENT, **Finance** (above, p. 360); NATIONAL HEALTH SERVICE (above, p. 362); PARLIAMENT, **Procedure** (above, p. 368); PUBLIC AUTHORITIES (above, p. 369); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 371).

SUBORDINATE LEGISLATION

Parliamentary proceedings

Select Committee on Statutory Instruments (*House of Commons*). On June 4, July 2, July 16, and July 23, 1957, the Committee considered 27, 23, 37 and 14 instruments, respectively, and resolved that it was unnecessary to draw the special attention of the House to them. The Committee asked for memoranda from Government Departments in respect of six instruments (H.C. 4 XII, XIII, XIV, XV of 1956–1957).

Special Orders' Committee (*House of Lords*). In the Tenth and Eleventh Reports, the Committee examined ten instruments. The Committee reported that none of them raised important questions of policy or principle; that seven were founded on precedent and three not so founded; and that all could be passed without special attention or further special inquiry (H.L. (95), (121) of 1956–1957).

TOWN AND COUNTRY PLANNING

Enforcement notice

The appellant was served by the local planning authority with an enforcement notice alleging that the land occupied by him had been developed by its use for the purposes of car breaking, car repairs and the sale of cars, and requiring him to discontinue that use and to restore the land to its previous condition as a domestic yard to a dwelling-house. The appellant did not appeal against the notice under section 23 (4) of the Town and Country Planning Act, 1947, but continued the existing use, and the planning authority preferred an information against him alleging default in complying with the notice, contrary to sections 23 and 24 of the Act. At the hearing of the summons the justices refused to admit evidence of the user of the yard prior to the appellant's occupation which the appellant wished to call to prove that his use of the land did not constitute development within the meaning of the Act, and they found him guilty of the charge alleged. On appeal, *held* that the appellant should have challenged the notice by way of appeal under section 23 (4), but having failed to do so he could not raise the point in the proceedings under section 24 (3): NORRIS *v.* EDMONTON CORPORATION [1957] 3 W.L.R. 388; [1957] 2 All E.R. 801, D.C.

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

Committee. The Report of the Committee on Administrative Tribunals and Inquiries (Chairman: Sir Oliver Franks) has been published (Cmnd. 218) and its principal proposals were briefly summarised in the last issue at pp. 197–198. We hope to print an article on the Report shortly.

The Committee has published an Index to the Evidence.

Disciplinary bodies

Dental committee. Rules have been published which provide the procedure for dealing with the removal of a name from the register of dentists on disciplinary grounds or on the ground that the name was fraudulently entered, and with the restoration of a name so removed (Parts II and III), and for dealing with the removal of the right of a body corporate to carry on the business of dentistry (Part IV). Part V contains general provisions as to the conduct of hearings, the admissibility of evidence, the method of voting at hearings and the right to be represented thereat (S.I. 1957 No. 1265).

Rules have also been published regulating the functions of the Legal Assessor appointed under section 8 of the Dentists Act, 1956, to advise the disciplinary committee on questions of law arising in disciplinary cases before them (S.I. 1957 No. 1470; and see [1956] P.L. 280–281).

National Health Service Tribunal. The Ministry of Health in a letter to Clerks of Executive Councils has named the present members of the Tribunal and the panels (E.C.L. 57/57 dated August 6, 1957).

National service

Umpire's decisions. Seven selected decisions by the Umpire in respect of applications for postponement of liability to be called up for service under the National Service Acts, 1948–1955, have been published by the Ministry of Labour and National Service (N.S.Code 2, Pamphlet No. 2/57 contains Decisions Nos. 99/57, 101/57, 112/57, 118/57; Pamphlet No. 3/57 contains Decisions Nos. 141/57, 175/57, 192/57).

Scottish Land Court

Report of the proceedings of 1956 under the Agriculture (Scotland) Act, 1948, Agricultural Holdings (Scotland) Act, 1949, Agriculture (Miscellaneous War Provisions) Act, 1940, Small Landholders (Scotland) Acts, 1886–1931, and Crofters (Scotland) Act, 1955, has been published (Cmnd. 216).

Transport Tribunal

Proceedings have been published in the matter of the application of the British Transport Commission (1957 No. 6) to confirm the British Transport Commission (Passenger) Charges Scheme, 1957, third, fourth, fifth, sixth and seventh days (88–99–3, 4, 5, 6, 7; and see above, p. 276).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial Development Corporation. The Secretary of State for the Colonies said that H.M.'s Government had decided that, as in the case of Ghana, the Corporation should not undertake new projects in such territories after independence. The Corporation would, however, be permitted to continue with schemes existing at the date of independence, and if necessary to provide further capital for these schemes after that date. It would also be enabled, on the request of the Government of any independent member of the Commonwealth to undertake the management of any project on a managing agency basis without commitment of the Corporation funds. H.M.'s Government intended to introduce legislation to give effect to these decisions as soon as possible by amending of the Overseas Resources Development Acts (572 H.C. Deb. *82*, July 1, 1957).

On July 17, 1957, the House of Lords debated a motion to resolve: That in the opinion of this House the Colonial Development Corporation is not being permitted by H.M.'s Government to make full use of its opportunities in Commonwealth and Colonial development, and that H.M.'s Government should change their policy and practice in this respect. The motion was defeated (204 H.L. Deb. 1245–1312, 1314–1330).

Commonwealth development. A White Paper has been published on The United Kingdom's Role in Commonwealth Development dealing with general considerations of policy, the working out of policy, technical co-operation, co-operation in the field of nuclear science, consultative and co-ordinating machinery (Cmnd. 237).

Governors. The Governors' Pensions Act, 1957 (5 & 6 Eliz. 2, c. 62), received the Royal Assent on July 31, 1957. It consolidates the Governors' Pensions Acts, 1911–1956, and repeals, *inter alia*, the Governors' Pensions Act, 1956 (see [1956] P.L. 399).

Schemes. The Return has been published of Schemes made under the Colonial Development and Welfare Acts, by the Secretary of State for the Colonies, with the concurrence of the Treasury, 1956–1957 (H.C. 200 of 1956–1957).

See also PARLIAMENT, **Public Accounts Committee (House of Commons)** (above, p. 369).

British Caribbean

See **West Indies** (below, p. 379).

British Guiana

Appeals. An Order in Council has been made which provides for conferring on the Federal Supreme Court of the Federation established by the West Indies (Federation) Order in Council, 1957, jurisdiction to hear and determine appeals from superior courts of British Guiana, provides that any such jurisdiction shall be in substitution for jurisdiction conferred by the West Indian Court of Appeal Act, 1919, on the court established thereby to hear and determine appeals from those courts and makes provision for certain incidental, consequential and transitional matters (S.I. 1957 No. 1527).

Cameroons

Report for 1956 has been published by H.M.'s Government to the General Assembly of the United Nations (Colonial No. 334).

And see **Nigeria** (below, p. 375).

Cyprus

Debate. On July 15, 1957, the House of Commons debated Cyprus in Committee of Supply (573 H.C. Deb. 773–904).

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Gibraltar

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Gilbert and Ellice Islands

Reports. The Colonial Reports, 1954 and 1955, have been published by the Colonial Office.

Hong Kong

Report. The Colonial Report, 1956, has been published by the Colonial Office.

Jamaica

Reports. The Colonial Reports, 1955 and 1956, for the Turks and Caicos Islands (Dependency of Jamaica) have been published by the Colonial Office.

See also **West Indies** (below, p. 379).

Malaya

Constitutional status. The Federation of Malaya Independence Act, 1957 (5 & 6 Eliz. 2, c. 60), received the Royal Assent on July 31, 1957. It gave Parliamentary approval to the conclusion between H.M. and the Rulers of the Malay States of such agreement as appeared to H.M. to be expedient for the establishment of the Federation of Malaya as an independent sovereign country within the Commonwealth. Independence day was August 31, 1957. The agreement is set out as an Annex to the Federation of Malaya Independence Order in Council (S.I. 1957 No. 1533). The Constitutions of the Federation of Malaya, and of Penang and Malacca as States of the Federation, are set out as schedules to the Annex.

The new Constitutions are based on the recommendations of the Reid Constitutional Commission which have undergone changes both in substance and in form. A White Paper, published on July 3, 1957, described the more important of these changes (see Cmnd. 210).

The Constitution for the new nation provides that the Head of State (Yang di-Pertuan Agong) will be elected for a term of five years by the Malay Rulers from among their number. In matters other than those within his discretion, the Head of State will act in accordance with the advice of the Cabinet of Ministers (Juma 'ah Mentri), or of a Minister acting under the general authority of the Cabinet. He will appoint the Cabinet, which will be collectively responsible to Parliament, on the advice of the Prime Minister (Perdana Mentri), from among members of either House of Parliament (Majlis). The Head of State will appoint as Prime Minister a member of the House of Representatives (Dewan Ra'ayat) who, in his judgment, is likely to command the confidence of the members of that House. Parliament will consist of two Houses, the Senate (Dewan Negara) and the House of Representatives. Twenty-two of the thirty-eight members of the Senate will be elected, two from each State, and sixteen will be appointed by the Head of State from persons who, in his opinion, have rendered distinguished public service, or achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service or are representative of racial minorities or are capable of representing the interests of aborigines. The Senate will be presided over by a President (Yang di-Pertua Dewan Negara) chosen from amongst its members. Senators must be not less than thirty years old. Eventually the House of Representatives will have 100 members (at first 104), elected in single member constituencies by citizens of twenty-one years and over. Members must also have attained the age of twenty-one. The House will be presided over by a Speaker (Yang di-Pertua Dewan Ra'ayat) chosen from amongst its members. Subjects for legislation are set out in a Federal List, a Concurrent List, on which the Federal and the States legislatures may legislate, and a State List. Federal law will prevail if inconsistency arises. Residual legislative power lies with the States.

All who are citizens of the Federation before independence will continue to be citizens and all born in the country thereafter will be citizens by operation of law. In accordance with the position of the Federation within the Commonwealth, every citizen who is a citizen of the Federation will enjoy, by virtue of that citizenship, the status of Commonwealth citizenship in common with the citizens of other Commonwealth countries. This provision will not, however, in any way impair the Federation's control over the entry of Commonwealth citizens or of the rights it is prepared to accord them in the Federation.

The Constitution makes provision for the maintenance of the independence of the judiciary. In appointing the Chief Justice, the Head of State may act in his discretion after consulting the Conference of Rulers and considering the advice of the Prime Minister, and, in appointing other judges of the Supreme Court, he shall, after consulting the Conference of Rulers, act on the recommendation of the Judicial and Legal Service Commission. He will be required, in this connection too, to consider the advice of the Prime

Minister and may once refer a recommendation back to the Commission for reconsideration. Normally a judge of the Supreme Court shall hold office until he attains the age of sixty-five. It is proposed that, if the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the Head of State that a judge of the Supreme Court ought to be removed on the ground of misbehaviour or inability to discharge the functions of his office, the Head of State shall appoint a tribunal to consider the matter, and may, on its recommendation, remove the judge from office. The tribunal will consist of not less than five persons who have held certain judicial offices, appointed on the recommendation of the Judicial and Legal Service Commission.

It has been agreed that the States should continue to receive large grants from the centre, and that they should be entitled to receive the grants and other sources of revenue as of right. The grants and other sources of revenue assigned to the States in this way will be (i) a capitation grant, (ii) a State road grant, and (iii) the proceeds from certain taxes, fees and other sources of specified revenue. In addition to the above grants, it has been agreed that each State should receive not less than 10 per cent. of the export duty on tin produced in the State. A State Reserve Fund will be established for the benefit of those States which may find difficulty in balancing their budgets without further assistance. The fund will also be used for development purposes generally, and it will be used in particular to assist those States which are most in need of additional capital.

The Constitution declares that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State, and every person will have the right to profess and practise his own religion and the right to propagate his religion, though this last right is subject to any restrictions imposed by State law relating to the propagation of any religious doctrines or belief among persons professing the Moslem religion. The position of each of the Rulers as head of the religion in his State, and the rights, privileges, prerogatives and powers enjoyed by him as head of that religion, will be unaffected and unimpaired.

Malay is to be the national language, with English permitted for official use for ten years after Independence Day and thereafter until Parliament otherwise provides. No person, however, will be prevented from using, otherwise than for official purposes, any other language.

Certain fundamental personal liberties are written into the Constitution and provision is made for safeguarding the special position of Malays and the legitimate interests of other communities.

(The above summary of the Constitution is based on Commonwealth Survey, C.O.I., July 23, 1957.)

In addition to documents already mentioned, see Federation of Malaya (Adaptation of Enactments) Order in Council, 1957 (S.I. 1957 No. 1534), the proposed Agreement on External Defence and Mutual Assistance between the Governments of the U.K. and the Federation (Cmnd. 263) and the Arrangements for the employment of Overseas Commonwealth Forces in Emergency Operations in Malaya (Cmnd. 264). (And see [1956] P.L. 181 and above, pp. 184, 280.)

Mauritius

Electoral boundaries. The Secretary of State for the Colonies announced the appointment of the Electoral Boundary Commission (Chairman: Sir Malcolm Trustram Eve) (573 H.C. Deb. *91–92*, July 15, 1957; see above, p. 187).

Ministerial system. The Secretary of State for the Colonies announced that nine unofficial members of the Executive Council were appointed Ministers on July 5, 1957, of whom six would hold portfolios (573 H.C. Deb. *51–52*, July 10, 1957; see above, p. 186).

Nigeria

Constitutional status. The conference on the Nigerian Constitution opened in London on May 23, 1957, under the chairmanship of the Secretary of State for the Colonies, and concluded on June 26, 1957. The following summary of the main proposals in the report is based on a statement issued by the United Kingdom Colonial Office.

1. The Western and Eastern Regional Governments asked that the undertaking given by the United Kingdom Government in 1953 (to grant Regional self-government to those Regions which desired it) should be implemented following the present conference. The Secretary of State reaffirmed that pledge, and the conference reached agreement on detailed proposals for the constitution of these self-governing Regions. These recommendations will include special provisions to ensure the independence of the judiciary, the public service (including the audit service), and the Director of Public Prosecutions. The Director of Public Prosecutions should be an officer in the public service with sole responsibility for the initiation, conduct and discontinuance of prosecutions.

It was agreed that safeguards for the Federation should be provided thus:—

(*a*) The Governor should be required, acting in his discretion, to reserve for Her Majesty's pleasure any Bill which, in his opinion, might have the effect of impeding or prejudicing the performance by the Federal Government of any of its functions, or endangering the continuance of federal government in Nigeria;

(*b*) the Governor-General in his discretion, and with the approval of the Secretary of State, should be empowered to issue such directions to a Region as he might think necessary to ensure that the executive authority of the Region was not exercised in such a way as to impede or prejudice the performance by the Federal Government of any of its functions, or to endanger the continuance of federal government in Nigeria.

Detailed arrangements were agreed upon for lump sum compensation schemes and for special safeguards for certain categories of public officers.

The Secretary of State undertook that, in advance of the making of the main constitutional instruments (which would take some months), he would submit to Her Majesty, within the next few weeks, proposals for interim instruments to enable a very large measure of self-government to be introduced in the Western and Eastern Regions at an early date.

2. The Northern Region asked that Regional self-government for the North should be introduced in 1959. In the meantime, certain constitutional advances were recommended, including an increase from 131 to 170 in the number of elected members in the House of Assembly and an enlargement of the House of Chiefs from fifty to sixty-two. As is normal at this stage of constitutional development, the Civil Secretary and Financial Secretary should cease to be members of the Executive Council, and the post of Deputy Governor should be created. The necessary steps to give effect to these changes would be taken at the earliest possible date.

3. On minority problems and the question of new States the conference reached agreement as follows:

(*a*) A commission of inquiry should be appointed by the Secretary of State to ascertain the facts about the fears of minorities in any part of Nigeria and to propose means of allaying those fears whether well- or ill-founded.

(*b*) Though the desire for the creation of new States in part arises from the fears of minorities, it would be impracticable to meet all these fears by the creation of new States. There are many different ethnic groups and peoples in Nigeria, and, however many States were created, minorities would still inevitably remain. The commission should therefore propose other means of allaying these fears and consider what safeguards should be included in the Constitution.

(*c*) However, if no other solution seemed to them to meet the case, the commission should be empowered as a last resort to make detailed recommendations for the creation of one or more new States, specifying the areas to be included and the governmental and administrative structure most appropriate.

(*d*) Before agreeing to any such recommendation, the United Kingdom Government would have to take into account the effect of the establishment of any such new States on the existing Regions and on the Federation as a whole. The United Kingdom Government would also have to be satisfied by the commission that any such new State would be viable from both the economic and administrative points of view, since, in their view, administrative and other practical reasons would inevitably limit most severely the possibility of the further sub-division of Nigeria into States modelled on the present Regional system. The United Kingdom Government also considered that while the creation of even one more State in any Region would create an administrative problem of the first order, the creation of more than one such State in any Region could not at present be contemplated.

4. On the structure of the Federal Government the conference noted the understanding among the delegations of the major political parties that the present Federal House of Representatives should run its full course, *i.e.*, until about the end of 1959. It was agreed that thereafter the House should consist of 320 representative members elected on the basis of one member for approximately each 100,000 of the population.

After the dissolution of the present House of Representatives, a second legislative house should be established with the title of Senate. The Senate should be composed of twelve members from each Region and the Southern Cameroons, four members from the Federal Territory of Lagos, and four special members appointed by the Governor-General in his discretion. Arrangements were agreed upon for the procedure for the selection of Senators.

The conference agreed to recommend the creation of the office of Prime Minister of the Federation, and the Secretary of State undertook to submit to Her Majesty, at an early date, proposals for an amendment to the Constitution to provide accordingly.

The Chief Secretary, the Attorney-General and the Financial Secretary should cease to be members of the Council. Instead of the office of Chief Secretary, the office of Deputy Governor-General should be established. The Attorney-General of the Federation should, until independence, remain a public officer with sole responsibility for the initiation, conduct and discontinuance of prosecutions.

The Prime Minister should be free to recommend to the Governor-General the appointment as a Minister of any member of the House of Representatives, including any member representing a Lagos constituency, except that there should continue to be one Minister drawn from the members of the House of Representatives elected in the Southern Cameroons.

The conference agreed to recommend that, until independence, the powers of the Governor-General should, apart from certain specific changes, remain unaltered, and in particular that he should continue to be responsible in his discretion for defence matters and for such external relations as might be entrusted to the Federation by the United Kingdom Government.

Members of the House of Representatives should be elected by universal adult suffrage in the Eastern and Western Regions, Lagos and the Southern Cameroons, and by adult male suffrage in the Northern Region.

The Governor-General should appoint an *ad hoc* delimitation commission to make recommendations for the division of the Federation into 320 single-member electoral districts. He should also appoint a permanent electoral commission to supervise the preparation of the federal electoral register and the conduct of all federal elections.

A committee of the conference which, under the chairmanship of the Governor-General, had been considering electoral arrangements, will reassemble in Lagos to continue its work.

5. The conference agreed to recommend a small number of changes in the present legislative lists as between the Federal and Regional Governments.

The conference agreed on questions relating to the control over and responsibility for the police, and the division of functions between Federal and Regional Governments.

6. It was agreed that the Secretary of State should appoint a Fiscal Commission to review the present system of allocation of revenues. Detailed terms of reference were decided upon.

7. The Secretary of State made the following statement about the future position of the trust territory of the Cameroons when Nigeria becomes independent:

> Her Majesty's Government fully recognise their obligations to the Cameroons under the Trusteeship Agreement.
>
> One of these obligations has been and is to administer the territory as an integral part of Nigeria. This has of course been on the assumption that Nigeria was a dependent territory. When Nigeria becomes an independent country, this arrangement will no longer be possible, so the Trusteeship Agreement will in any case have to be reviewed at that stage.
>
> When Nigeria becomes independent one possibility would be that the Cameroons should remain part of it. This would involve the termination of the Trusteeship Agreement and would require consultation with the United Nations. I can state quite categorically that there can be no question of obliging the Cameroons to remain part of an independent Nigeria contrary to her own wishes.
>
> Before Nigeria becomes independent the people of the North and South sectors of the Cameroons would have to say freely what their wishes were as to their own future. Among the options open to them would be to continue under the Trust Administration of the United Kingdom. I must in fairness add the warning that you would not thereby be given the golden key to the Bank of England! But many of the best friends of the Cameroons do not foresee a destiny more likely to promote her happiness and prosperity than in continued association with Nigeria.
>
> Her Majesty's Government will of course pay the very greatest regard to their views, whatever form they may take.

The delegate from the Northern Cameroons reaffirmed the decision taken by the Northern Cameroons in 1953 to remain part of the Northern Region.

Constitutional advances were agreed upon for the Southern Cameroons, including an enlarged House of Assembly, the establishment of a House of Chiefs for consultative purposes, an unofficial majority in Executive Council, the introduction of Ministerial responsibility, and the creation of the office of Premier.

8. At the beginning of the conference the three Regional Premiers and the Leader of Government Business in the Southern Cameroons submitted a memorandum containing joint proposals that the United Kingdom Government should undertake to grant independence to the Federation of Nigeria in 1959.

The Secretary of State explained that, before this request could be usefully discussed, a number of other important questions must be dealt with, including such matters as the future structure of the Federation and the allocation of revenues.

The conference accordingly first proceeded to deal with the various problems about which agreement was reached as recorded above.

Discussion and agreement on these and other matters enabled the Secretary of State to give further consideration to the question of self-government for Nigeria, and at the 19th Plenary Session on June 23 he made the following statement:—

> I understand that it is proposed that some time about January 1960 the new Nigerian Parliament will debate a resolution asking Her Majesty's Government to agree to full self-government within the Commonwealth by a date in 1960 which will have been mentioned in the resolution. In any case the constitutional machinery would take time and you would no doubt bear this very much in mind in coming to a conclusion as to what date you should ask for. It might therefore be (as many of you have urged) a good thing for there to be some informal consultation with us as to what sort of date was realistic. On receipt of your resolution Her Majesty's Government will consider it with sympathy and will then be prepared to fix a date when they would accede to the request. We could not at this stage give any undertaking that the date would be the same date as asked for in the resolution, though we would do our utmost to meet the resolution in a reasonable and practicable manner. Delegates, I hope, know Her Majesty's Government well enough to be sure that they would not invent reasons for artificially extending the date. Her Majesty's Government would of course be very much guided in their choice of a date by the way everything was going, by how the two Regions now about to enjoy Regional self-government had taken the strain of this great step forward, and by how the country as a whole had faced up to the problems of minorities, on which a Commission would already have reported.

There was a general discussion of this statement in the course of which a variety of views were expressed. On the following day the Sardauna of Sokoto made the following statement on behalf of himself, of the other Regional Premiers, Dr. Nnamdi Azikiwe and Chief Obafemi Awolowo, and of Dr. Endeley, the Leader of Government Business in the Southern Cameroons:

> We have given further consideration to the Secretary of State's statement on the independence of the Federation of Nigeria. We feel bound to express our disappointment that it has not been possible for Her Majesty's Government to give an undertaking to grant independence to Nigeria on a date to be named in 1960 by the new Nigerian Parliament.
>
> The year 1959 has been unanimously proposed by the people of Nigeria, and we have given consideration to a date in 1960 only because we appreciate that the solution to the various problems that must be disposed of before independence will take a longer time than we had thought.
>
> Having gone thus far on the path of reason and realism, we had thought that the Secretary of State would accede to our united wishes.
>
> In the circumstances we can do no more than to take note of the Secretary of State's statement, while reserving to ourselves the right to pursue the issue further with a view to impressing upon Her Majesty's Government the necessity for granting independence to the Federation of Nigeria not later than April 2, 1960.

The Secretary of State said in reply that he took careful note of this joint statement, as he had taken most careful note of the various views that had been expressed on the previous day on the acceptability of his statement.

9. It was agreed that there should be a resumed conference to deal with the reports of the Commissions which it had been decided to set up and with certain other matters left over by agreement from the present conference.

10. Opportunity was taken of the presence in London of representatives of the Nigerian Governments at the constitutional conference to conclude the negotiation of the Special List Agreements envisaged in Cmd. 9768 (see [1956]

P.L. 253–254). Under these agreements, which were signed on June 25, members of Her Majesty's Overseas Civil Service in the service of the Nigerian Governments will be given the opportunity to enter the service of Her Majesty's Government in the United Kingdom. Officers who do so will continue to be employed in Nigeria on secondment to one of the Nigerian Governments so long as their services are required. The agreements provide safeguards regarding their subsequent employment outside Nigeria, their salaries and conditions of service and the payment of their pensions and other benefits.

The Report of the Conference is published as Cmnd. 207. S.I. 1957 Nos. 1363 and 1530 amend the provisions of the Nigeria (Constitution) Order in Council, 1954, relating to the Legislative Houses established, the powers of the legislatures, the Council of Ministers of the Federation and the Executive Councils of the Regions. S.I. 1957 No. 1531 amends the Nigeria (Offices of Governor-General and Governors) Order in Council, 1954, so as to provide for the creation of the offices of Deputy Governor-General of the Federation and Deputy Governor of the Northern Region.

Rhodesia and Nyasaland

Removal. The Northern Rhodesia Order in Council, 1924, provides that a native cannot be removed from any land assigned to him for occupation except by order of the Governor. An Order in Council has been made confining that prohibition to cases where land has been assigned to natives for occupation under native customary law (S.I. 1957 No. 1529).

Report. The Colonial Report, 1956, for the Nyasaland Protectorate has been published by the Colonial Office.

Sierra Leone

House of representatives. An Order in Council has been made amending the Sierra Leone (House of Representatives) Order in Council, 1956, by removing from section 13 of that Order the provision that a person possessed of professional qualifications, who has been disqualified from practising his or her profession, is disqualified for membership of the House. The Order also provides for amendment of the provisions as to disqualification on conviction for crime (S.I. 1957 No. 1532).

Tanganyika

Agricultural Corporation. The Tanganyika Agricultural Corporation Act, 1957 (5 & 6 Eliz. 2, c. 54), received the Royal Assent on July 31, 1957. It empowers the Secretary of State to make grants to the Governor of Tanganyika to enable him to provide funds required by the Corporation for carrying on the undertaking transferred to that Corporation by section 1 of the Overseas Resources Development Act, 1954.

And see PUBLIC AUTHORITIES, **Overseas Food Corporation** (above, p. 369).

Report for 1956 has been made by H.M.'s Government in the U.K. to the General Assembly of the United Nations (Colonial No. 333).

Uganda

Elections. An Order in Council has been made enabling the existing legislature of the protectorate to make provision for the election of members to the new Legislative Council which it is proposed should hereafter be established and constituted for the Protectorate, and enabling registration of electors (S.I. 1957 No. 1528).

West Indies

Constitution. In accordance with the terms of the British Caribbean Federation Act, 1956 (see [1956] P.L. 401), an Order in Council has been made (S.I. 1957 No. 1364).

The constitution of the new federation was published as an annex to the Order, and will come into force on such a date as the Queen may, by a further Order in Council, appoint.

The following is a summary of the main features of the constitution as set out in the annex.

1. The preamble to the constitution affirms the principles of freedom of religious worship and the greatest possible freedom of movement of persons and goods within the federation, and sets out the aim of establishing, as quickly as possible a customs union, including internal free trade.

2. The federation of the West Indies will consist of the colonies of Antigua, Barbados, Dominica, Grenada, Jamaica, Montserrat, St. Christopher Nevis and Anguilla, St. Lucia, St. Vincent, and Trinidad and Tobago. It will have a Governor-General (see above, p. 286), who will be the Queen's representative in the federation. The seat of Government will be in Trinidad (see above, p. 181).

3. There will be a two-chamber legislature, consisting of a Senate of nineteen members, appointed by the Governor-General (two representing each territory except Montserrat, which will have one), and a House of Representatives of forty-five members (seventeen from Jamaica, ten from Trinidad, five from Barbados, one from Montserrat and two from each of the other territories), elected by adult suffrage. No member of either Council may serve at the same time on either the Legislative or the Executive Council of any of the territories.

At its first meeting the Senate will elect two Senators to be respectively President and Vice-President. The House of Representatives, at its first meeting, will elect a Speaker, who may be from inside or outside the House, and a Deputy Speaker, who must be a Member. The President of the Senate and the Speaker may exercise a casting vote only.

Both Chambers will normally have a life of five years, although the House of Representatives may be dissolved earlier.

4. Subjects for legislation are set out in an exclusive list and a concurrent list, published as a schedule to the constitution. The federal legislature will have power to legislate with respect to any matter in either list, federal law prevailing in the event of inconsistency with the law of a territory. Territorial legislatures may legislate on subjects in the concurrent list. Legislation on matters not contained in either list is for the legislatures of the territories.

Legislation by Order in Council may be enacted for the federation in the United Kingdom in respect of defence, external relations or the maintenance of the financial stability of the federation.

5. A Council of State, consisting of a Prime Minister and ten other Ministers, and normally presided over by the Governor-General, will be the principal instrument of policy for the federation. The Prime Minister will be elected by the House of Representatives from among its own members, and the other Ministers will be appointed by the Governor-General on the advice of the Prime Minister, not less than three being members of the Senate and the rest members of the House of Representatives. The Governor-General will be empowered to nominate three persons holding office in the public service of the federation who will have the right to attend meetings of the Council of State and take part in discussions.

The Governor-General will be required to act in accordance with the advice of the Council of State except in certain specific instances. In matters concerning defence, external relations or the financial stability of the federation he is required to obtain the approval of the Secretary of State for the Colonies if he acts contrary to the advice of the Council of Ministers.

6. A Federal Supreme Court will be established, presided over by a Chief Justice and with three or more federal justices, all appointments being made by the Governor-General after consultation with the Prime Minister. The Federal Supreme Court will have original jurisdiction in proceedings concerning the federation as a whole or involving more than one territory. It

will also be a court of appeal from the superior courts of the territories. There will be no right of appeal to the Privy Council, unless such right is granted by a law of the federal legislature.

7. In each of the first five years, the federal Government will derive its revenue mainly from a mandatory levy on the territorial Governments and each territory is required to pay only the proportion set out in a schedule to the constitution. The federal Government will also be entitled to any profits from the issue of currency.

8. A public service commission, consisting of a chairman and not less than two or more than four members, appointed by the Governor-General, will be set up for the federation. With certain specific exceptions (including Attorney-General, Clerk of the Senate and of the House of Representatives, and representatives of the federation in other countries) the Commission will be responsible for recommending appointments to all offices in the public service of the federation.

9. The Queen in Council may, by Order, amend or revoke any of the provisions of the constitution, and may amend the constitution for the purpose of including in the federation other colonies with their dependencies. (Specific mention is made of the possible accession of British Guiana or British Honduras, which would require the creation of additional seats in the Senate and the House of Representatives.)

10. Not less than five years after the constitution comes into force, a conference will be convened, consisting of delegates from the federation, from each of the unit territories, and from the United Kingdom, chosen by their respective Governments, for the purpose of reviewing the constitution. Among other matters, the conference will review, in the light of progress made towards establishing a customs union within the federation and other relevant factors, the powers conferred on the federal Government to make provision for the levy of taxes on income and profits.

(This summary is based on Commonwealth Survey, C.O.I., August 20, 1957.)

The draft of this constitutional Order in Council was debated in the House of Commons on July 26, 1957 (574 H.C. Deb. 809–842), and in the House of Lords on July 29, 1957 (205 H.L. Deb. 225–230).

BOOK REVIEWS

JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD. By EDWARD MCWHINNEY. [Toronto: Toronto University Press. 1957. 218 pp. 68s.]

THIS is a good book which might have been better. In any case it will be very useful to English public lawyers who desire a conspectus of the ways in which courts deal with the constitutionality of enactments not only throughout the Commonwealth but also in the United States. For that is what the author means by judicial review. He does not indeed give a narrow interpretation to judicial review as so understood, for he deals with cases where, not in the United Kingdom alone, courts use their power of interpretation to make enactments conform to their notion of what is constitutionally proper, having in their mind's eye primarily the common law. On the other hand, he is not concerned with the conformity of subordinate legislation to its parent enactments.

The author gives an excellent sketch of the law and practice in one country after another, a sketch because he does not attempt the impossible task of covering the ground in detail, excellent because he gives a lively and sufficiently accurate picture of the doctrinal tendencies which have made themselves felt from time to time. It is the critical side of his work that I find not wholly satisfactory.

He does not, it is true, fall into the traps that have ensnared so many persons in the past who share a way of thinking that seems to be rather left of centre. He knows for instance that the Watson-Haldane enhancement of provincial power chimed very well with Canadian public opinion during the long period of Liberal predominance, and that the Privy Council nullified Mr. Bennett's New Deal legislation at a time when his government had gone out of office, just as the Supreme Court of the United States overturned the National Recovery legislation at a time when it had done its work and was no longer needed in so extreme a form. He knows also that the Australian electorate have approved similar action by the High Court of Australia by the only means in their power, namely by turning out the party that enacted bank nationalisation and refusing by referendum to increase the powers of the Commonwealth. On the other hand one need not find fault with his dislike of the referendum as a mode of constitutional amendment, since it almost always results in a negative decision. My objection to his critical treatment is that he plumps too blindly against the legalistic view that the courts take of their functions in the Commonwealth. One might easily imagine that there was nothing to be said in favour of that view, despite the fact that it is held by so great a judge as Chief Justice Dixon. Now the case against legalism is so powerful that there must be something to be said on the other side. It is absurd to say that so highly sophisticated a judge as Sir Owen Dixon, who, it must be remembered, spent a great part of the war on leave from the High Court as Australian Ambassador to the United States, should not know the arguments against legalism, should nevertheless, out of sheer conservatism, pursue his way unaffected by the practice of the U.S. Supreme Court or should even murmur to himself "Credo quia incredibile."

The fact is that, although it is true that even a strict adherence to legalism cannot save a judge from having to apply notions of policy, it does at any rate greatly limit the occasions on which he has to do so. Moreover, by being legalistic, he does at least recognise his duty to decide cases objectively and not according to his individual preference, however well grounded it may be in political or economic theory. Finally, a legalistically minded judge has the best opportunity of making himself the servant of legal principle or reason or whatever you prefer to call it, rather than of the will of founding fathers, fathers of confederation, or of the present generation.

The attack on legalism would indeed hardly have been made but for the experience of the United States Supreme Court, and the moral of that experience is, as the author seems to recognise, not at all clear. Not everybody has at all times been satisfied with the decisions which the court has handed down in the light of policy. In any case, the court was set the task of interpreting restrictions on governmental power expressed in the widest and vaguest terms. Was it entirely an accident that later constitution-makers in the older Dominions declined to follow the American example? Finally, however greatly we may value the independence of the judges, we cannot put them on the same pedestal and endow them with the same power to expound their own notions of policy in a parliamentary system as in one where the executive and the legislature are at arm's length and often enough hostile to one another. In a parliamentary democracy the judiciary cannot be *tertius gaudens*.

Incidentally, did Lord Watson and Lord Haldane really strengthen the Canadian Provinces by giving a legalistic interpretation to the British North America Act? I thought they acted upon a theory of federalism that was nowhere expressly stated in the Act. Legalism, accompanied by the strict adherence to precedent expected of a common law judge, should probably have led them to maintain the supremacy of the Dominion.

No one will criticise the author for not having the gift of prophecy, but it would be interesting to know what he now thinks of the recent conduct of the U.S. Supreme Court, in which a strengthening of the professional legal element has coincided with a marked revival of " judicial activism " in protecting the individual against governmental pressure and an unusual extension of the war against the trusts.

F. H. LAWSON.

THE TORMENT OF SECRECY. By EDWARD A. SHILS. [London: William Heinemann, Ltd. 1956. 238 pp. 15s.]

THIS analysis of the background and consequences of American security policies by the Professor of Social Sciences in the University of Chicago is a sociological study of the best kind. It recollects in tranquillity while the struggle still rages. The book is divided into four Parts. Part I, entitled Secrecy: Restriction and Overflow, is divided into chapters on publicity, privacy and secrecy, with references to the British pattern; Part II, on The Background of Excess, considers the disillusionment after the war, the atomic bomb, subversion by infiltration, hyperpatriotism, xenophobia and isolationism, fundamentalism, the fear of revolution, and populism; and " the strain of politics "; Part III, on Consequences, has chapters on the deformation of civility, the autonomy of science, political discourse and the sense of affinity, the private sphere and the protection of security; Part IV is entitled Pluralism against Extremism.

Writings on sociology, like those on psychology, have still, particularly in England, to contend with prejudice, which is itself explicable in sociological and psychological terms. Jargon strengthens the prejudice which exists principally, perhaps, because we do not like to be told, in words which we do not altogether understand, that our passions are explicable, and their causes less obvious than we had thought. Professor Shils is no defender of the way in which American security policies were administered and his careful and scholarly analysis is a much stronger indictment of that administration than the more common and less restrained accusations hurled at the accusers.

Much of what is said in this book has implications for every society. For the extremism in America under McCarthy and others had origins in attitudes of mind and external world circumstances which are common to all.

Mass communication, in particular, has its particular dangers in our tight island. To a remarkable extent the British people have withstood the moulding influences of popular Press and sound radio. The general belief that the newspapers are meant for entertainment and not for the giving of accurate information has proved healthy, on balance. The B.B.C. has certainly imposed standards but has maintained a fair measure of political impartiality. Television may be a more difficult influence to withstand but it also is firmly regarded as a form of entertainment. Populism—which Professor Shils considers at some length—is the theoretical converse of authoritarianism, seeking to establish the mythical will of the people as the ultimate standard of justice and morality. Those who claim to interpret that will are at once authoritarians of the most dangerous kind, using the deep fears and hates for self-advancement.

In solving our own problems of security, we need to be aware of the sociological and psychological aspects of publicity, privacy and secrecy. Professor Shils should be read by everyone who is uneasy about the future of personal freedom and, even more, by those who are content with our present solutions.

J. A. G. GRIFFITH.

A TREATISE ON ADMINISTRATIVE LAW. By MORRIS D. FORKOSCH. [Indianapolis: The Bobbs-Merrill Co. Inc. 1956. xiv and 856 pp.]

THE books of cases and other materials which have dominated the reading of American law students are gradually being rivalled by a series of equally substantial textbooks. There is a temptation to assess the merits of a new textbook on administrative law by reference to the standard of scholarship set by Kenneth Culp Davis's great work. But such a comparison would be unfair to Professor Forkosch, who has set himself the relatively modest task of devising a teaching tool for law students who will become practitioners. And only the dullest student can fail to be stimulated by this book. It is written in a lively style, and the text is interspersed with diagrams and other visual aids. The diagrams are ingeniously constructed, and one can at least admire the author's courage in seeking to depict the scope of judicial review and the working of the administrative process in two single-page charts.

Even more than most other writers on American administrative law, Professor Forkosch lays his emphasis on judicial review of agency action. He devotes much of his book to the identification of " points of attack." " Throughout the volume," he writes, " these PATs are highlighted, so that readers may see a few of the many Achilles' heels available to them." The American administrator might well take to his tent, for Professor Forkosch has supplied his battalions with an armoury of weapons for the onslaught. The English reader will find that the book gives a good account of judicial review, particularly with reference to the substantial evidence rule. He will not find an adequate account of administrative powers and procedures except in so far as they are related to the author's central themes. But he is unlikely to close the book without having cause to wonder whether the traditional patterns of exposition used in English textbooks are in fact the best that it is possible to devise.

S. A. DE SMITH.

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